EXHIBIT 25

PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: http://www.fcc.gov
TTY: 1-888-835-5322

DA 07-5109
December 31, 2007

NOTICE OF DOMESTIC SECTION 214 AUTHORIZATION GRANTED

WC Docket No. 07-270

The Wireline Competition Bureau grants the application listed in this notice pursuant to the Commission's streamlined procedures for domestic section 214 transfer of control applications, 47 C.F.R. § 63.03. The Wireline Competition Bureau has determined that grant of this application serves the public interest.[1] For purposes of computation of time for filing a petition for reconsideration or application for review, or for judicial review of the Commission's decision, the date of "public notice" shall be the release date of this notice.[2]

1. Domestic Section 214 Application Filed for the Transfer of Control of Birch Telecom, Inc. to Access Integrated Networks, Inc., WC Docket No. 07-270, DA 07-4784 (rel. Nov. 29, 2007).

Effective Grant Date: December 30, 2007

For further information, please contact Tracey Wilson-Parker at 202 / 418-1394 or Matthew Warner at 202 / 418-2419, Competition Policy Division, Wireline Competition Bureau.

– FCC –

[1] *Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations*, Report and Order, 17 FCC Rcd 5517, 5529, para. 22 (2002).

[2] *Id.*; *see* 47 C.F.R. § 1.4 (Computation of time).

EXHIBIT 26

PUBLIC NOTICE

Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Fax-On-Demand 202 / 418-2830
TTY 202 / 418-2555
Internet: http://www.fcc.gov
ftp.fcc.gov

DA 07- 4784
Released: November 29, 2007

DOMESTIC SECTION 214 APPLICATION FILED FOR THE TRANSFER OF CONTROL OF BIRCH TELECOM, INC. TO ACCESS INTEGRATED NETWORKS, INC.

STREAMLINED PLEADING CYCLE ESTABLISHED

WC Docket No. 07-270

Comments Due: December 13, 2007
Reply Comments Due: December 20, 2007

The following application was filed pursuant to section 63.03 of the Commission's rules requesting approval to transfer control of Birch Telecom, Inc. (Birch) to Access Integrated Networks, Inc. (AIN) (together Applicants).[1] Birch is a Delaware corporation that provides competitive voice and data services in twenty-six states through its twenty-eight, U.S. based, direct and indirect subsidiaries. Birch will continue to hold 100% of the equity, directly or indirectly, of each of its subsidiaries after the transfer is consummated. AIN is a Georgia company that provides competitive local and long distance services to residential and small business customers in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. AIN is wholly owned by Access Investors, LLC, which in turn is owned by Holcombe Green (62%) and R. Kirby Godsey (33%), both U.S. citizens. Applicants state that no other person or entity owns a ten percent or greater direct or indirect share of Access Investors, LLC. Applicants assert that the proposed transaction is entitled to presumptive streamlined treatment under section 63.03(b)(2)(i) of the Commission's rules, and that a grant of the application will serve the public interest, convenience, and necessity.[2]

Application Filed for the Transfer of Control of Birch Telecom, Inc. to Access Integrated Networks, Inc., WC Docket No. 07-270 (filed Nov. 16, 2007).

[1] 47 C.F.R § 63.03; *see* 47 U.S.C. § 214. Applicants are also filing applications for transfer of control associated with authorization for international services. Any action on this domestic 214 application is without prejudice to Commission action on other related, pending applications. Applicants filed a supplement to their domestic section 214 application on Nov. 28, 2007.

[2] 47 C.F.R. § 63.03(b)(2)(i).

GENERAL INFORMATION

The Wireline Competition Bureau finds, upon initial review, that the transfer of control identified herein is acceptable for filing as a streamlined application. The Commission reserves the right to return any transfer of control application if, upon further examination, it is determined to be defective and not in conformance with the Commission's rules and policies. Pursuant to section 63.03(a) of the Commission's rules, 47 C.F.R. § 63.03(a), interested parties may file comments **on or before December 13, 2007,** and reply comments **on or before December 20, 2007**. Unless otherwise notified by the Commission, the Applicants may transfer control on the 31st day after the date of this notice.[3] Comments must be filed electronically using (1) the Commission's Electronic Comment Filing System (ECFS) or (2) the Federal Government's eRulemaking Portal. *See* 47 C.F.R. § 63.03(a) ("All comments on streamlined applications shall be filed electronically . . . ."); *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Comments may be filed electronically using the Internet by accessing the ECFS, http://www.fcc.gov/cgb/ecfs/, or the Federal eRulemaking Portal, http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.

- For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

In addition, email one copy of each pleading to each of the following:

1) The Commission's duplicating contractor, Best Copy and Printing, Inc., fcc@bcpiweb.com; phone: 202 / 488-5300; fax: 202 / 488-5563;

2) Tracey Wilson-Parker, Competition Policy Division, Wireline Competition Bureau, tracey.wilson-parker@fcc.gov;

3) Matthew Warner, Competition Policy Division, Wireline Competition Bureau, matthew.warner@fcc.gov;

4) David Krech, International Bureau, Policy Division, International Bureau, david.krech@fcc.gov

5) Cheryl Callahan, Telecommunications Policy Access, Wireline Competition Bureau, cheryl.callahan@fcc.gov; and,

6) Jim Bird, Office of General Counsel, jim.bird@fcc.gov.

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[3] Such authorization is conditioned upon receipt of any other necessary approvals from the Commission in connection with the proposed transaction.

Filings and comments are available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, S.W., Room CY-A257, Washington, D.C. 20554. They may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554; telephone: 202 / 488-5300; fax: 202 / 488-5563; email: fcc@bcpiweb.com; url: www.bcpiweb.com.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202 / 418-0530 (voice), 202 / 418-0432 (tty).

For further information, please contact Tracey Wilson-Parker at 202 / 418-1394 or Matthew Warner at 202 / 418-2419.

- FCC -

EXHIBIT 27

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NOS COMMUNICATIONS, INC.,
Complainant,

v. File No. E-92-91

AMERICAN TELEPHONE
AND TELEGRAPH COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: November 23, 1992; Released: December 2, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. In this order, we address a Motion for Temporary Stay and Emergency Relief (Motion), filed by Nos Communications Inc. (NOS), a reseller of the Distributed Network Services (DNS) and Software Define Network (SDN) services of American Telephone and Telegraph Company (AT&T). NOS seeks the issuance of a Commission order "staying the effect of its policies that permit AT&T to terminate service for non-payment of charges and/or to require the payment of disputed charges, advance payment or deposits before continuing to process NOS' orders for new or changed services for its DNS resale offerings to the public, or terminate service to NOS on such basis ...."[1] In opposition to NOS' Motion, AT&T contends that the Commission's rules contemplate grant of a stay only where review or reconsideration of a Commission order could be sought and that there is no Commission rule that authorizes a stay of a carrier's duly filed and effective tariffs. AT&T contends further that under the Communications Act carriers must adhere to and apply their filed tariffs, without exception, unless a tariff is first found unlawful. AT&T also contends that, even if the four-part test governing a stay of an agency action or decision were to apply, NOS has not shown that it will suffer irreparable harm nor made the other showings required to obtain the extraordinary relief it seeks. For reasons discussed below, we deny NOS' Motion.

2. In determining whether to grant the extraordinary remedy of a stay of its action, the Commission generally considers whether the petitioner has made a strong showing that it is likely to prevail on the merits on appeal, that irreparable injury would result absent a stay, a stay will not substantially harm other interested parties, and that a stay will be in the public interest.[2] NOS has not shown that it would be irreparably injured by paying the disputed amounts billed to it by AT&T or that it cannot be made whole should it ultimately prevail on the merits of its complaint.[3] The Commission previously has stated that a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier's applicable tariffed charges and regulations.[4]

3. The Commission generally is disinclined to intervene in matters involving a carrier's decision to terminate service of a particular customer that has failed to pay legally effective and overdue tariffed charges for tariffed service that the carrier has duly rendered. Nor is the Commission inclined to second guess a carrier's decision, with respect to a particular customer, to impose deposit, advance payment or other security arrangements provided for in its tariff. Such determinations properly are matters within the carrier's business judgment and, as such, ordinarily will be left undisturbed, absent a showing that the carrier acted unreasonably or unduly discriminated.[5]

4. In this connection, even though *Mocatta Metals*,[6] a case on which AT&T relies, predated the Commission's decisions prescribing unlimited resale for all domestic common carrier services,[7] it nevertheless is instructive. The finding there that the carrier's termination of service for non-payment was lawful assumed that the customer had been properly billed. *Mocatta Metals*, 54 FCC 2d at 118. Carriers have been cautioned that a decision to terminate a customer's service, or their refusal to accept or to provision a customer's additional orders for service, particularly when such customer, as here, is a competitor, has grave consequences and should not be taken lightly.[8] Such action would be proper, and not anticompetitive, only if a carrier had "substantially performed" and "reasonably discharged all of its obligations" under its tariff, including, but not limited to, billing accurately and granting credits called for under all of the circumstances of a particular case. *Id.* at 117-18. Whether AT&T's conduct in this regard was, in

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[1] Motion at 9.

[2] Comark Cable Fund III v. Northwestern Indiana Telephone Co., 104 FCC 2d 451, 456 (1985), *citing* Virginia Petroleum Jobbers Assoc. v. FPC, 259 F.2d 921 (D.C. Cir. 1958); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); Big Valley Cablevision, Inc., 85 FCC 2d 973, 978 (1981).

[3] NOS' showing of supposed irreparable harm consists mostly, if not entirely, of conclusionary allegations that it will be "eliminated from the marketplace" or put out of business if AT&T cuts off its service (Motion at 3,4) or "forced to abandon the field" if AT&T does not process its orders. (*Id.* at 8,9). In light of NOS' failure to show irreparable injury, we need not reach findings urged by AT&T that NOS also failed to meet any of the other criteria of the four-prong test for a stay.

[4] MCI Telecommunications Corp., 62 FCC 2d 703, 705-06 (1976) (Customer may not withhold payment of properly billed tariffed charges for voluntarily ordered services).

[5] Business Choice Network v. AT&T, _____ FCC Rcd _____ (Enf.Div.Com.Car.Bur.1992); slip op., DA 92-1582 (released Nov. 18, 1992).

[6] Mocatta Metals Corp., 54 FCC 2d 104 (ALJ R. Lozner 1975).

[7] Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261 (1976), *modified*, 62 FCC 2d 588 (1977), *aff'd sub nom.* AT&T v. FCC, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978); Resale and Shared Use of Common Carrier Domestic Switched Network Services, 83 FCC 2d 167 (1980).

[8] Business Choice Network v. AT&T, *supra*, slip op. at 3.

fact, lawful is an issue to be determined, following further discovery, on the record in the above-captioned proceeding.[9]

5. In view of the foregoing, we conclude that NOS has not met its burden for the extraordinary relief that it seeks.

6. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the Motion For Temporary Stay and Emergency Relief, filed by Nos Communications, Inc. on or about June 18, 1992, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[9] In this connection, we note, *e.g.*, NOS' allegation that it "has been victimized by AT&T's obdurate refusal to promptly, properly, and accurately provision NOS' SDN orders." Formal Complaint and Request for Emergency Relief, filed June 18, 1992, at 2, an allegation that AT&T has denied. Verified Answer of American Telephone and Telegraph Company, filed August 5, 1992 (Answer) at 2. AT&T avers that it has complied with all requirements of the Act and the Commission's rules and orders and that it "has provided timely and high quality service and billing to NOS at all times." Answer at ii.

EXHIBIT 28

TECHNOLOGIES MANAGEMENT INC

2600 Maitland Center Pkwy.
Suite 300
Maitland, FL 32751
P.O. Drawer 200
Winter Park, FL
32790-0200
Tel: 407-740-8575
Fax: 407-740-0613
www.tminc.com

October 28, 2008
Via Overnight Delivery

Mr. George Li
Federal Communications Commission
International Facilities Division
9300 East Hampton Drive
Capital Heights, MD 20743

RE: **ITC-214-19970926-00584; Access Integrated Networks d/b/a Birch Communications**

Dear Mr. Li:

The original and five (5) copies of this letter is submitted on behalf of **Access Integrated Networks d/b/a Birch Communications** to correct the name change that was originally submitted on October 21, 2008. The company's name should be **Birch Communications, Inc.**, not Birch Communications. We apologize for any inconvenience in this matter.

Please acknowledge receipt of this filing by returning, file-stamped, the extra copy of this cover letter in the self-addressed, stamped envelope enclosed for that purpose.

Any questions regarding this filing may be directed to my attention at (407) 740-3006 or via email at croesel@tminc.com. Thank you for your assistance in this matter.

Sincerely,

Carey Roesel
Consultant to Birch Communications

CR/gs

cc: Sharyl Fowler - Birch
file: Birch - FCC 214
tms: FCCi0801a

EXHIBIT 29

978 F.2d 727

298 U.S.App.D.C. 230, 137 P.U.R.4th 444

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents.
US Sprint Communications Company, US West Communications, Inc., Ameritech Operating Companies, MCI Telecommunications Corporation, International Business Machines Corporation, Ad Hoc Telecommunications Users Committee, Intervenors.

No. 92-1053.

United States Court of Appeals,
District of Columbia Circuit.

Argued Sept. 22, 1992.
Decided Nov. 13, 1992.
Rehearing and Rehearing En Banc
Denied Jan. 21, 1993.

[298 U.S.App.D.C. 231] Petition for Review of an Order of the Federal Communications Commission.

David W. Carpenter, Chicago, Ill., with whom Peter D. Keisler, Washington, D.C., Francine J. Berry, and Mark C. Rosenblum, Basking Ridge, N.J., were on the brief, for petitioner.

John E. Ingle, Deputy Associate Gen. Counsel, F.C.C., with whom Robert L. Pettit, Gen. Counsel, F.C.C., Laurence N. Bourne, Counsel, F.C.C., Catherine G. O'Sullivan and Robert J. Wiggers, Attys., Dept. of Justice, Washington, D.C., were on the brief, for respondents.

Frank W. Krogh, Donald J. Elardo, Loretta J. Garcia, and Richard M. Singer, Washington, D.C., were on the brief, for intervenor MCI Telecommunications Corp.

James S. Blaszak and Patrick J. Whittle, Washington, D.C., were on the brief, for intervenor Ad Hoc Telecommunications Users Committee.

Leon M. Kestenbaum, H. Richard Juhnke, and Michael B. Fingerhut, Washington, D.C., entered appearances, for intervenor US Sprint Communications Co.

Robert B. McKenna, Denver, Colo., and Lawrence E. Sarjeant, Washington, D.C., entered appearances, for intervenor US WEST Communications, Inc.

[298 U.S.App.D.C. 232] Alfred Winchell Whittaker, Washington, D.C., and Floyd S. Keene, Hoffman Estates, Ill., entered appearances, for intervenor Ameritech Operating Companies.

J. Roger Wollenberg, William T. Lake and Jonathan Jacob Nadler, Washington, D.C., entered appearances, for intervenor Intern. Business Machines Corp.

Before: WALD, SILBERMAN, and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge SILBERMAN.

SILBERMAN, Circuit Judge.

AT & T petitions for review of an order of the Federal Communications Commission that concluded an investigation into a complaint filed by AT & T in 1989. The complaint alleged that MCI had violated and was continuing to violate section 203 of the Communications Act, 47 U.S.C. § 203 (1988), by charging some customers rates that were not filed with the FCC. The Commission denied AT & T's complaint in part and dismissed it in part without determining whether MCI had violated the Act and ostensibly without addressing the validity of the Commission's Fourth Report and Order, **95 F.C.C.2d 554** (1983), on which MCI had relied to justify its actions. The FCC said that it would postpone reconsideration of the validity of the Report to a rulemaking that it announced at the same time it denied AT & T relief. We hold that it was arbitrary and capricious for the agency to dismiss AT & T's complaint for immediate relief without deciding the question of law it presented. Moreover, we think that in dismissing the complaint the FCC necessarily, if implicitly, assumed the validity of the Fourth Report as a substantive rule. And under our precedent the rule is plainly contrary to section 203. We remand to the Commission for it to reconsider the appropriate relief it should grant AT & T.

I.

Section 203(a) of the Communications Act, 47 U.S.C. § 203(a) (1988), requires that every communications common carrier file its rates with the FCC. [1] AT & T's dispute with MCI and the FCC involves "permissive detariffing," a term used to refer to the FCC's decision to forbear from enforcing the rate filing requirements of section 203 against carriers, including MCI, that the FCC determined to be nondominant in the inter-exchange market (presumably AT & T remains the only "dominant" carrier in the FCC's view). [2] Permissive detariffing's genesis is found in the Competitive Carrier proceeding the FCC initiated in 1979 to determine methods for reducing the regulatory burdens on communications common carriers. See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Notice of Inquiry and Proposed Rulemaking, **77 F.C.C.2d 308** (1979). In 1982 in its Second Report and Order, the Commission decided that it would forbear from enforcing section 203(a)'s filing requirements against nondominant resale carriers. See Second Report and Order, 91 F.C.C.2d 59, 71 (1982). And in its 1983 Fourth Report and Order, the Commission extended the policy of forbearance (in other words, permissive detariffing treatment) to "specialized carriers" such as MCI. See Fourth Report and Order, **95 F.C.C.2d 554** , 578 (1983).

The Commission, however, went beyond mere forbearance in 1985 in its Sixth Report and Order, **99 F.C.C.2d 1020** (1985), by making detariffing mandatory and by telling non-dominant carriers that it would

Page 730

[298 U.S.App.D.C. 233] no longer even accept their rate filings under section 203. For reasons not apparent, MCI, an apparent beneficiary of the Sixth Report, challenged that order in this court on the grounds that the FCC had no authority to eliminate a requirement of the Communications Act. See MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C.Cir.1985) ("MCI v. FCC "). We vacated the Sixth Report after concluding that it exceeded the Commission's statutory authority. We explicitly did not decide the validity of the earlier Fourth Report and Order, but our decision not to do so was predicated on the assumption that the Fourth Report was (at least arguably) immune from review under Heckler v. Chaney, **470 U. S. Reports 821** , 105 S.Ct. 1649 , 84 L.Ed.2d 714 (1985) , as an exercise of enforcement discretion. See MCI v. FCC, 765 F.2d at 1190 n. 4.

The Commission, in subsequent litigation, did not help to clarify the nature of the Fourth Report. In 1985 the FCC argued that the Fourth Report could be "fairly characterized" as an exercise of the agency's enforcement discretion and that it was thus immune from review.

Respondent's Brief at 27, MCI Telecommunications Corp. v. FCC, 799 F.2d 773 (D.C.Cir.1984) (Memorandum Order). In the same brief, however, the Commission referred to the Second and Fourth Reports as rules designed to "exempt" some carriers from the filing requirements of the Act. Id. at 29.

In August 1989, with the FCC's characterization of the Fourth Report apparently still uncertain, AT & T filed a complaint against MCI under section 208 of the Communications Act. Section 208 allows any person injured by a violation of the Act to file a complaint with the Commission, see 47 U.S.C. § 208(a) (1988), [3] and requires the Commission to investigate the complaint and issue an order concluding the inquiry within 12 to 15 months. See id. § 208(b). AT & T claimed that since 1987, MCI had been violating, and continued to violate, section 203(a) by charging certain customers special negotiated rates that it had not filed with the FCC. AT & T sought both damages and a cease and desist order. According to AT & T, MCI's actions injured AT & T by putting AT & T at a competitive disadvantage. While AT & T had to file all of its rates with the Commission, MCI did not, thus not only making it more difficult for AT & T to match MCI's rates, cf. Regular Common Carrier Conference v. United States, 793 F.2d 376 , 379 (D.C.Cir.1986), but also enabling MCI and other competitors to entangle AT & T in burdensome proceedings before the Commission by filing oppositions to the rates AT & T filed.

MCI, in response, did not deny AT & T's factual allegations. It relied on the Fourth Report. According to MCI, the Fourth Report was a substantive rule that removed the nondominant carriers' obligation to file all of their rates under section 203(a). AT & T contended, in accordance with our tentative understanding, that the Fourth Report had been merely a statement of the FCC's enforcement policy and therefore MCI still had an independent obligation imposed by statute to file all of its rates. If the Fourth Report were a substantive rule that purported to remove obligations imposed by the statute, AT & T

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[298 U.S.App.D.C. 234] argued, it was invalid under our MCI v. FCC opinion because it exceeded the FCC's statutory authority.

Despite section 208's requirement that the Commission issue an order concluding its investigation into a complaint within 12 months, see 47 U.S.C. § 208(b)(1), AT & T's complaint went unresolved for a good deal longer. The FCC first determined that the complaint raised a broad issue of policy and should be transferred to its policy division. Thereafter, a decision on the complaint was further postponed pending the conclusion of the Commission's rulemaking on Competition in the Interstate Interexchange Marketplace. See Report and Order, 6 F.C.C.Rcd. 5880 (1991). Finally, in October 1991, 25 months after the complaint had been filed, AT & T petitioned this court for a writ of mandamus ordering the Commission to issue a cease and desist order against MCI. We dismissed the petition in January 1992 when the FCC announced that it would issue an order concluding its investigation by January 30, 1992.

On January 28, 1992, the FCC concluded its inquiry but nevertheless declined to decide forthrightly the issue before it. See AT & T Communications v. MCI Telecommunications Corp., 7 F.C.C.Rcd. 807 (1992). Although the Commission, dispelling prior confusion, determined conclusively that the Fourth Report and Order was a substantive rule upon which MCI had properly relied, see id. at 809, it purported not to consider whether the Fourth Report, so interpreted, was valid under the Communications Act. Instead, the Commission said the Fourth Report's "validity" would be better considered in a rulemaking that would afford all interested parties an opportunity to comment. Id. And the Commission announced such a rulemaking on the same day it issued the order concluding the investigation. See Tariff Filing Requirements for Interstate Common Carriers, Notice of Proposed Rulemaking, 7 F.C.C.Rcd. 804 (1992). The Commission thus asserts that it dismissed AT & T's claim for a cease and desist order without ever determining whether MCI was violating the Communications Act. Nevertheless, the Commission rejected AT & T's claim for damages because it determined that MCI was entitled to rely on the Fourth Report as a substantive rule that removed MCI's obligation to file all its rates.

AT & T Communications v. MCI Telecommunications Corp., 7 F.C.C.Rcd. at 809. The FCC reasoned that even if the rule were declared invalid under the Communications Act, the consequence of that invalidity (whatever it may be) should not apply retroactively to MCI's past conduct. Id.

II.

A.

It is rather apparent that, because the Commission fears the Fourth Report cannot withstand judicial scrutiny (at least in our court), it wants to avoid judicial review of the rule. This will allow the Fourth Report to continue to govern the conduct of carriers for as long as possible. The Commission relies on SEC v. Chenery Corp., **332 U. S. Reports 194** , 67 S.Ct. 1575 , 91 L.Ed. 1995 (1947) , for the general proposition that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." Id. at 203, 67 S.Ct. at 1580 (citation omitted). This maxim of administrative law permits an agency to develop a body of regulatory law and policy either through case-by-case decisionmaking (a quasi-adjudicative process) or through rulemaking (a quasi-legislative process). The Commission claims that it merely exercised a choice between these methods by dismissing AT & T's complaint without ruling on the merits, [4] and that it then put on its quasi-legislative hat to reconsider the Report in a new rulemaking. The difficulty with the Commission's approach--a sort of

Page 732

[298 U.S.App.D.C. 235] administrative law shell game--is that it is a logical non sequitur to AT & T's complaint. AT & T's complaint asserts that MCI is acting illegally under present law, that MCI has violated the law in the past, and that AT & T is and has been injured by MCI's behavior. AT & T did not, as it can do under the Administrative Procedure Act (APA), request a new rulemaking. See 5 U.S.C. § 553(e). When presented with AT & T's complaint, the Commission had an obligation to answer the questions it raised and to decide whether MCI had violated the statute.

The agency's responsibilities as an adjudicator are especially clear under the Communications Act. Sections 206-208 of the Act give AT & T the right to press a claim for damages suffered due to violation of the Act either in federal court or before the Commission. See 47 U.S.C. §§ 206-208. The statute thus expressly sets up the Commission as an adjudicator of private rights. [5] The question before the Commission as the adjudicator was whether or not MCI had been, and currently was, violating the law. If it was, at a minimum (putting aside the question of whether AT & T has a right to damages) AT & T was entitled to a cease and desist order at that point. The FCC's proposal to consider the general problem AT & T raises in a future rulemaking--a process designed to consider whether to issue new normative standards--is, when one thinks hard about it, a non-response to the complaint. It is similar to a judge dismissing a complaint based on a federal statute because he has been informed that Congress is conducting hearings on whether to change the statute. Like the judge, the agency has an obligation to decide the complaint under the law currently applicable. Cf. Meredith Corp. v. FCC, 809 F.2d 863 , 874 (D.C.Cir.1987), cert. denied, **493 U. S. Reports 1019** , 110 S.Ct. 717 , 107 L.Ed.2d 737 (1990) .

Agencies do have a fundamental choice whether to interpret and apply federal statutes through adjudication or through rulemaking. But they cannot avoid their responsibilities in an adjudication properly before them by looking to a rulemaking, which operates only prospectively. See Bowen v. Georgetown Univ. Hosp., **488 U. S. Reports 204** , 208, 109 S.Ct. 468 , 471, 102 L.Ed.2d 493 (1988) . The choice an agency has between different methods of "making law" is simply irrelevant when the agency is called upon as an adjudicator to apply existing law to a complaint. Here, as in Meredith, the Commission "confuses its quasi-judicial role with its quasi-legislative one." Meredith, 809 F.2d at 873 .

The Commission claims that a two-party adjudication would not have been suitable to consider the validity of the Fourth Report because so many carriers in the industry have an interest in the question. We do not think the FCC had any alternative but to confront the issue. However, it easily could have solicited the views of other carriers. The FCC was quite free to invite them to intervene or file briefs as non-parties. See General Amer. Transp. Corp. v. ICC, 883 F.2d 1029 , 1030 (D.C.Cir.1989) (Silberman, J., concurring in denial of rehearing). Indeed, nothing stopped the FCC from initiating a companion rulemaking when AT & T filed its complaint--as long as the Commission concluded its inquiry into AT & T's complaint within the 12 to 15 month period required by section 208 of the Act. Nor are we impressed with the FCC's argument that section 208 authorized the Commission's action by giving the agency authority to investigate complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208(a). A future rulemaking that will consider modifying the Fourth Report is in no sense an investigation of AT & T's complaint. It could not possibly be, because a rulemaking can affect the conduct of parties only prospectively; it does not determine the legality of past conduct. AT & T, it must be understood, challenged MCI's past and present actions. A cease and desist order,

[298 U.S.App.D.C. 236] to be sure, can be thought to provide prospective relief, but it must be based on the premise that existing law has been violated.

The Commission's more interesting argument is that it could not "consider" AT & T's challenge to the legality of the Fourth Report because it could not disregard its own rule in an adjudication. See American Fed'n of Gov't Employees v. FLRA, 777 F.2d 751 (D.C.Cir.1985) . We have never held, however, that an agency is obliged to apply a rule in an adjudicatory context if intervening events indicate that the rule is unlawful. Our opinion in Meredith points in the other direction. There we concluded that the FCC was obliged to entertain petitioner's claim that the FCC's Fairness Doctrine was unconstitutional, whether or not the FCC changed its policy in a new rulemaking. See Meredith, 809 F.2d at 873-74 . Similarly, then Judge Scalia, concurring in American Federation of Government Employees, recognized that in some situations, when an agency declines to apply its own rule in an adjudication "we would be justified [on appeal] in looking beyond the defect of inconsistency, to affirm an adjudication on the ground that its result was mandated by statute and that the conflicting rule was simply unlawful." American Fed'n of Gov't Employees, 777 F.2d at 760 (Scalia, J., concurring). Judge Scalia's concern for situations only dimly perceived in that case seems very much on the mark, for otherwise an agency would be required to apply a rule in an adjudication until it had revoked the rule in a new rulemaking, even if the Supreme Court had invalidated the interpretation upon which the rule was based.

In any event, the Commission's stated concern seems to us to be a red herring. If the agency believed its rule was invalid and did not want to so hold in an adjudication, as we mentioned above, it immediately could have started a companion rulemaking to repeal the rule. The agency's own lawyers could have determined the rule was inconsistent with the statute and a Notice of Proposed Rulemaking would then have so stated. [6] The rule then simply could have been revoked and perhaps a new rule could have been adopted. But surely the agency was not required to apply the invalid rule in the meantime.

Typically, of course, when an agency's rule is challenged in an adjudication as inconsistent with the agency's authorizing statute, the agency rejects the challenge on the merits and the supposed concerns the FCC expresses here are never voiced. The agency applies its rule because it believes the rule is lawful, and the agency is prepared to stand by it forthrightly in a subsequent appeal. The FCC's unusual position here is plainly engendered by a desire to keep the rule in effect as long as possible despite serious doubts that the rule could not withstand judicial review. The Commission thought to achieve this goal by dismissing the complaint, thereby maintaining the legal regime created by the rule. Yet, it sought to do so without squarely relying on the rule to justify the dismissal. In that way, the Commission hoped to avoid judicial review. We have little difficulty in concluding that it was arbitrary and capricious for the

Commission to dismiss AT & T's complaint with only a promise to address the legal issue it raised in a future rulemaking. To the extent that the Commission thought it had discretion to postpone decision to a rulemaking, it misunderstood its role as an adjudicator.

B.

The Commission, not surprisingly in light of its obvious strategy, insists that even if we conclude, as we do, that the agency's dismissal of AT & T's complaint violated the law, we should not reach the validity of the Fourth Report. According to the Commission, the order below did not apply the Fourth Report or consider its validity and, indeed, did not even determine the lawfulness of MCI's conduct. Thus, we are told we must remand the case to the agency, so that the Commission can determine the validity of the rule in the adjudication.

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[298 U.S.App.D.C. 237] We are quite aware that to accept the Commission's argument would be to allow the FCC's troubling tactics largely to succeed. The FCC, it will be recalled, did not decide AT & T's complaint within the statutory time period. It was only after AT & T brought a mandamus petition before us 25 months after the complaint had been filed that the FCC agreed to issue its decision. To remand the case now for the FCC to "consider" the validity of the Fourth Report would simply permit the FCC to delay the process further. Moreover, a remand seems especially unnecessary in light of our prior opinion in MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C.Cir.1985) , which, as we discuss below, virtually settles the issue in this court.

Still, we need not rely on these factors to conclude that the Fourth Report is properly before us. It is well established that a rule may be reviewed when it is applied in an adjudication--an agency need not explicitly reassess the validity of a rule to subject the rule to challenge on review. See NLRB Union v. FLRA, 834 F.2d 191 , 195 (D.C.Cir.1987); Functional Music, Inc. v. FCC, 274 F.2d 543 , 546 (D.C.Cir.1958), cert. denied, **361 U. S. Reports 813** , 80 S.Ct. 50 , 4 L.Ed.2d 60 (1959) . [7] Despite the Commission's protestations to the contrary, we think the Commission necessarily relied on the Fourth Report in its decision to dismiss AT & T's complaint.

The Report, and the Commission's desire to protect it, clearly provided the underlying rationale for the order under review. The Commission explicitly justified its decision to dismiss on the grounds that the complaint challenged "the Commission's previously adopted and effective forbearance rule." AT & T Communications v. MCI Telecommunications Corp., 7 F.C.C.Rcd. 807, 809 (1992). And, in denying AT & T retrospective relief, the Commission relied on its conclusion that the Fourth Report was a substantive rule that removed the obligation of carriers to file tariffs. Id. The FCC's only reason for clarifying its view of the Report was to provide MCI and other carriers with a regulatory sanction for their behavior. As the Commission concluded: "It would be manifestly unfair to entertain AT & T's claim that MCI's alleged past conduct, which the Commission explicitly approved in advance, may give rise to a finding of liability." Id. (emphasis added).

Whatever tortured language the Commission used to describe its actions, [8] the decision to dismiss AT & T's complaint necessarily must have rested on the Fourth Report and placed an implicit imprimatur on the Fourth Report 's interpretation of the statute. The notion the FCC advances before us--that it did not apply the Report and did not determine whether or not MCI had violated the statute--suggests that its order merely left the parties in legal limbo. But the Commission ignores the practical effect of its order. In dismissing the complaint, the Commission rejected AT & T's request for relief and definitively sanctioned MCI's conduct. There is no conceivable basis for the agency's

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[298 U.S.App.D.C. 238] action other than a temporary reliance on the Fourth Report's interpretation of the statute as a valid statement of the law, at least for the interim period between the time of the dismissal and the conclusion of the new rulemaking. Notwithstanding its claims for discretion to proceed either by rulemaking or by adjudication, the Commission does not, and could not, claim that pending a new rulemaking it has authority to decide complaints contrary to the law. Once the Commission's necessary reasoning is recognized, the Commission's sophistic claim that it did not apply the Report or pass on its validity evaporates.

Finally, we see no need to remand to obtain an agency interpretation of the statute. [9] The Commission, of course, set forth its statutory construction when it promulgated the rule. When a rule is challenged in its application, courts typically examine the validity of the rule on the basis of the reasoning offered when the rule was originally promulgated. See, e.g., National Ass'n of Greeting Card Publishers v. United States Postal Serv., 607 F.2d 392 , 425 n. 59 (D.C.Cir.1979), cert. denied, **444 U. S. Reports 1025** , 100 S.Ct. 688 , 62 L.Ed.2d 659 (1980) ; Network Project v. FCC, 511 F.2d 786 , 789 n. 1 (D.C.Cir.1975). And, in any event, the agency has already fully defended (unsuccessfully) in MCI v. FCC the very statutory interpretation that underpins the Fourth Report. Accordingly, we pass on to the merits.

III.

It is unnecessary to consider any more whether the Fourth Report is merely an enforcement policy. The Commission has determined unequivocally that it is a substantive rule [10] designed to affect not only the FCC's enforcement policies, but also the relationships and rights of the "dominant" carrier, AT & T, and all other carriers. As a substantive rule, the Fourth Report is simply not defensible in this court. Its validity hinges on the interpretation of section 203 of the Communications Act. Section 203(a) states that "every" carrier "shall" file its tariffs with the Commission. 47 U.S.C. § 203(a). We said in MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C.Cir.1985) , " 'Shall ... is the language of command.' " Id. at 1191 (quoting Escoe v. Zerbst, **295 U. S. Reports 490** , 493, 55 S.Ct. 818 , 819, 79 L.Ed. 1566 (1935)). The Commission points out (as it did in MCI) that section 203(b) allows the Commission to "modify any requirement" of the section "in particular instances or by general order applicable to special circumstances or conditions." 47 U.S.C. § 203(b)(2). According to the FCC, that language allows the Commission to remove the filing obligation from certain carriers as long as it continues to enforce the substantive requirements of sections 201 and 202--namely that rates be just, reasonable, and nondiscriminatory. See 47 U.S.C. §§ 201-202. Although the argument was not insubstantial when made initially, we concluded that the language of the statute was not susceptible to the Commission's reading. [11]

In MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C.Cir.1985) , as noted above, we concluded that section 203(b) could not be interpreted to permit the Commission's attempt to require nondominant carriers to stop filing tariffs under section 203(a). We struck down the mandatory detariffing rule contained in the Commission's Sixth Report and Order. See MCI, 765 F.2d at 1195-96 . To be sure, we explicitly reserved holding on the permissive detariffing scheme of the Fourth Report, but only because we believed the Report "arguably immune from judicial review" as a

[298 U.S.App.D.C. 239] simple statement of enforcement policy. Id. at 1190 n. 4. Our reasoning in MCI forecloses the Commission's argument in this case. We said in MCI that the language of section 203(b) "suggest[s] circumscribed alterations--not, as the FCC now would have it, wholesale abandonment or elimination of a requirement." Id. at 1192. To "modify," we thought, suggests to "alter; to change in incidental or subordinate features." Id. (quoting BLACK'S LAW DICTIONARY 905 (5th ed. 1979)). Whether detariffing is made mandatory, as in the Sixth Report, or simply permissive, as in the Fourth Report, carriers are, in either event, relieved of the obligation to file tariffs under section 203(a). That step exceeds the limited authority granted the Commission in section 203(b) to "modify" requirements of the Act. [12]

* * * * * *

We understand fully why the Commission wants the flexibility to apply the tariff provisions of the Communications Act to AT & T, which the Commission regards as the dominant carrier, differently from the way it applies the tariff provision to other competing carriers. We do not quarrel with the Commission's policy objectives. But the statute, as we have interpreted it, is not open to the Commission's construction. The Commission will have to obtain congressional sanction for its desired policy course.

IV.

There remains AT & T's claim for damages. The Commission, as part of its strategy to avoid judicial review of the Fourth Report, disposed of this claim by concluding that, assuming, arguendo, the Fourth Report was contrary to law, AT & T would still not be entitled to damages because any such determination of law should not be applied "retroactively." In other words, MCI was entitled to rely on the Commission's interpretation of the statute embodied in the Fourth Report. The Commission applied the five factor test we have used to determine whether new law developed by an agency in adjudication should be applied retroactively, see Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380 , 390 (D.C.Cir.1972); see also Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074 , 1081 (D.C.Cir.1987), cert. denied, **485 U. S. Reports 913** , 108 S.Ct. 1088 , 99 L.Ed.2d 247 (1988) , and decided the answer to the hypothetical question in this case was no. AT & T claims that, in light of our MCI decision, an explicit Commission recognition that its Fourth Report is ultra vires is no real change in the law.

We do not think it appropriate to resolve this dispute and apply the five factor test

[298 U.S.App.D.C. 240] at this stage because we do not fully understand what the Commission sees as "the law" to be applied retroactively. By implication, the Commission must be referring to a prospective change in its regulation, but we think it is analytically incoherent to consider whether that change should be applied retroactively until it is fashioned. If the Commission means, instead, only its acceptance of our MCI interpretation, it would have to explain why that is a change in the law. The Commission may be relying on its right to refuse to acquiesce in one (or more) court of appeals' interpretation of its statute, but, then, how does it explain the interrelationship between a party's possible cause of action in the district court and one before the Commission? Would parties be entitled to damages in the United States District Court for the District of Columbia (particularly in light of our MCI opinion), but not before the Commission?

* * * * * *

We remand the case to the Commission, having vacated the Fourth Report as contrary to the Communications Act, with instructions to reconsider AT & T's claim for relief. It would appear that AT & T is entitled promptly to a cease and desist order against MCI. We do not direct the Commission to provide specific relief, however, partly out of a reluctance to direct an agency as to the exact remedy to be employed and partly because of our expectation that the practices sanctioned by the Fourth Report will cease since carriers who do not file tariffs will be subject to damage suits in our district court. The Commission will also have to reconsider AT & T's damages claim. If the Commission continues to believe that retroactivity is an obstacle to recovery of damages, it must explain what it understands to be the applicable law and why that law constitutes a change that implicates retroactivity concerns.

It is so ordered.

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1 47 U.S.C. § 203(a) states: "Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules

showing all charges for itself and its connecting carriers for interstate ... communication...."

47 U.S.C. § 203(b)(2) states:

The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions....

2 In its First Report and Order, **85 F.C.C.2d 1** (1980), the Commission determined that among interexchange telephone carriers, only AT & T exerted market power and was thus dominant. See id. at 22-24, 27-30.

3 47 U.S.C. § 208(a) states:

Any person, any body politic or municipal organization, or State Commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission.... If ... there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

47 U.S.C. § 206 states:

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequences of any such violation of the provisions of this chapter....

4 Whether it was possible analytically for the FCC to dismiss AT & T's complaint without implicitly ruling on the claim is another question. As we discuss below in Part III, we think that by dismissing the complaint the Commission necessarily sanctioned MCI's conduct under the statute.

5 Presumably, AT & T chose to bring its case before the Commission because AT & T is primarily interested in a cease and desist order. The statute does not explicitly grant the district court power to issue such an order, but the parties and intervenors all assume that the Commission could grant such relief.

6 Here, of course, the agency also had the benefit of the parties' briefs.

7 A simple citation to these cases also suffices to dispense with the FCC's claim that AT & T's challenge to the Fourth Report was not timely because it was not filed when the Report was first issued. The FCC's argument that the complaint was not timely seems particularly meritless in this case because it was not until the FCC issued the very order under review here that it was clear that the Fourth Report was a substantive rule that altered carriers' obligations under the statute. In any event, the contention that AT & T's challenge was not timely, or, as the Commission now argues, that it is barred by the doctrine of laches, cannot justify the Commission's decision since neither reason was cited by the Commission in its original order. See SEC v. Chenery Corp., **318 U. S. Reports 80** , 63 S.Ct. 454 , 87 L.Ed. 626 (1943) .

8 The Commission claimed that it could dispose of AT & T's claim for "prospective relief" (a cease and desist order) because, although "nominally stated in terms of a request for relief against MCI, [it] is in practical effect a challenge to the Commission's previously adopted and effective forbearance rule." See AT & T Communications v. MCI Telecommunications Corp., 7 F.C.C.Rcd. 807, 809 (1992). That is, of course, true, but it hardly justifies the Commission's ostensible refusal to consider the validity of the rule. Whether the relief to be considered is damages or a cease and desist order, the question before the Commission is whether MCI has been and is violating the law.

9 We would normally be obliged to follow this course if the statutory language were ambiguous.

10 The language of the Fourth Report amply justifies the Commission's reading. The Fourth Report begins by proposing "to remove ... regulatory requirements for non-dominant carriers," Fourth Report and Order, **95 F.C.C.2d 554** , 555 (1983), and concludes by giving carriers, subject to the order, "permission to cancel their tariffs on file with this Commission," id. at 582.

11 Our opinion, although it does not cite Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., **467 U. S. Reports 837** , 104 S.Ct. 2778 , 81 L.Ed.2d 694 (1984) , postdates that case.

12 As we discussed in MCI, the Second Circuit's interpretation of section 203(b) is similarly restricted. See id. at 1192 (citing American Tel. & Tel. Co. v. FCC, 572 F.2d 17 (2d Cir.), cert. denied, **439 U. S. Reports 875** , 99 S.Ct. 213 , 58 L.Ed.2d 190 (1978) ; and American Tel. & Tel. Co. v. FCC, 487 F.2d 865 (2d Cir.1973)).

As AT & T points out, our opinion in MCI is somewhat buttressed by the more recent Supreme Court case, Maislin Industries, U.S. v. Primary Steel, Inc., **497 U. S. Reports 116** , 110 S.Ct. 2759 , 111 L.Ed.2d 94 (1990) . There, the

Court rejected the ICC's "deregulatory" interpretation of the quite similar rate-filing provisions of the Interstate Commerce Act, 49 U.S.C. §§ 10761-10762 (1988), which share a common ancestor with the Communications Act, the original Interstate Commerce Act. Due to this shared lineage, an interpretation of one of the modern statutes is often thought instructive in judicial construction of the other. See MCI Telecommunications Corp. v. FCC, 917 F.2d 30 , 38 (D.C.Cir.1990); American Broadcasting Cos. v. FCC, 643 F.2d 818 , 820-21 (D.C.Cir.1980); AT & T v. FCC, 487 F.2d at 873-74 . In Maislin, a carrier had negotiated a rate with a shipper that was below the carrier's filed rate. When the carrier tried to collect the filed rate rather than the negotiated rate, the ICC, under its Negotiated Rate Policy, rejected the carrier's claim. The Supreme Court, however, disapproved the ICC's interpretation of the Act. "[B]y sanctioning adherence to unfiled rates," the Court said, the ICC had "undermine[d] the basic structure of the Act." Maislin, **497 U. S. Reports 132** , 110 S.Ct. at 2769 . The Court concluded that compliance with the filing requirements was " 'utterly central' to the administration of the Act," id. (quoting Regular Common Carrier Conference v. United States, 793 F.2d 376 , 379 (D.C.Cir.1986)) and that the obligation to charge only filed rates had "always been considered essential to preventing price discrimination," id. at 126, 110 S.Ct. at 2761 . Despite the harsh result for a shipper who had negotiated a lower rate, the Court thought the ICC must adhere to the "filed rate doctrine" that requires carriers to charge, and shippers to pay, only the rate filed with the ICC.

EXHIBIT 30

FCC 96-58

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
	)
Ameritech Operating Companies	)
	)
Petition for a Declaratory Ruling	)
and Related Waivers	)
to Establish a New Regulatory Model	)
for the Ameritech Region	)

ORDER

Adopted: February 14, 1996 Released: February 15, 1996

By the Commission, Chairman Hundt and Commissioner Barrett issuing separate statements:

Table of Contents

I. INTRODUCTION

1. Ameritech seeks waivers of the Commission's rules to permit it to use different methods for assessing certain categories of access charges prescribed by our rules, and to allow it greater interstate pricing flexibility. Ameritech presents these waiver requests in the context of its "Customers First Plan," a multi-jurisdictional effort in which, according to Ameritech, it has removed many barriers to local competition (in concert with state regulators), and seeks reduced regulation in return. In the context of Ameritech's proposals, the Illinois Commerce Commission and the Michigan Public Service Commission each have adopted orders seeking to facilitate the development of telecommunications competition in those states, and Ameritech has filed tariffs responding to those state commission orders. Ameritech claims that, given the development of competition in the provision of telecommunications services in Illinois and Michigan, and the steps it has taken to eliminate barriers to such competition, some of our current access charge and pricing rules unfairly disadvantage Ameritech and produce inefficient results. In this order, we address

Ameritech's access charge waiver requests; the waiver requests relating to pricing flexibility will be the subject of a future order.

2. Ameritech claims that certain access charges contain subsidy components that result in rates in excess of the costs of providing the underlying services, and that such pricing cannot be sustained in a competitive environment. Although Ameritech favors a comprehensive industry-wide reform of the access charge and jurisdictional separations rules, including an increase in end-user subscriber line charges, it claims that the existing rules impose special hardships upon Ameritech because market conditions in its region differ from conditions in other parts of the country. Therefore, it argues that it needs interim relief from the requirements of the current rules while the Commission explores more comprehensive reform through changes to its rules. Accordingly, Ameritech asks the Commission for permission to implement what it styles as the "Competitively Neutral Recovery of Subsidies" (CNRS). Under this proposal, Ameritech would recover certain costs that are currently included in its per-minute interstate access charges by "bulk billing" interexchange carriers (IXCs) directly for their share of the aggregate amount of those costs.

3. As an interim step, we grant Ameritech's request in part, subject to certain modifications discussed below. We conclude, based on this record, that the removal of barriers to competition and the emergence of competitors in local telecommunications markets in portions of the Chicago and Grand Rapids local access and transport areas (LATAs) within Illinois and Michigan constitute "special circumstances" under the Commission's waiver standard. We determine that Ameritech's requests are properly before us in the context of a waiver request, and that some relief from our access rules is therefore justified to address the special circumstances Ameritech has identified. We permit Ameritech, as it requests, to bulk bill the portion of Ameritech's carrier common line charge that contributes to the NECA Long Term Support fund for high-cost carriers. While bulk billing of common line costs raises some concerns about competitive distortions, we conclude that the public interest would be served by allowing Ameritech, on an interim basis, pending a comprehensive reform of our access charge rules, to recover a portion of its common line costs through a modified form of bulk billing in lieu of the per-minute carrier common line (CCL) charge. Finally, while we decline at this time to allow Ameritech to bulk bill a portion of the transport interconnection charge, we allow Ameritech to reduce that charge on a geographically-deaveraged basis in the Chicago and Grand Rapids LATAs.

II. BACKGROUND

4. In its current form, the Customers First Plan affects three jurisdictions: Illinois, Michigan, and the FCC.[1] Ameritech has presented to two state commissions proposals in which it has agreed to unbundle certain services and establish conditions for other providers of local exchange service to interconnect with Ameritech's network. The Illinois and Michigan commissions have issued orders in response to those proposals, and Ameritech has filed tariffs in those states to implement the requirements of the state commission orders. At the FCC, Ameritech seeks waivers to restructure the way it recovers certain access charges from IXCs, in order to redress what Ameritech sees as imbalances in the current system that will become problematic as competition develops. In addition, Ameritech is seeking, with the support of the United States Department of Justice (DOJ), a waiver of the MFJ to offer originating interLATA service on a trial basis in Chicago and Grand Rapids.

A. The Access Charge Rules

5. Ameritech provides local exchange telephone services in Illinois, Indiana, Michigan, Ohio, and Wisconsin. Among other things, Ameritech, like other local exchange carriers (LECs), provides access facilities that are used to originate and terminate long-distance services furnished by IXCs. Ameritech's services, known as interstate access services, enable IXCs to originate and terminate interstate long-distance calls and are regulated by this Commission. Part 69 of the Commission's Rules[2] governs the rate structure and pricing of interstate access charges, and prescribes the rate elements for switched access services that must be used in the LECs' tariffs, as well as the method for assessing charges for these services.[3]

6. The waivers requested by Ameritech would affect two of the major switched access charges: (1) the carrier common line (CCL) charge; and (2) the transport interconnection charge. "Common line" is the term in the Part 69 Rules that refers to the facilities that connect subscriber premises and LEC end office switches, also known as "local

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[1] Ameritech also sought a waiver of the Modification of Final Judgment (MFJ) to offer in-region interLATA service as part of its overall Customers First proposal. *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). That request appears to have been rendered moot by the Telecommunications Act of 1996. *See* The Telecommunications Act of 1996, P.L. 104-104, §§ 271, 601(a), 110 Stat. 56 (approved February 8, 1996) (Telecommunications Act of 1996); *infra* para. 11.

[2] 47 C.F.R. Part 69.

[3] Interstate access services that use LEC local or end office switching functions are known as switched access. Access services that do not use such switching functions are described as special access.

loops" or "subscriber lines." Local loops are used in common for local exchange, interstate access, and other services. Common line costs are largely non-traffic sensitive: that is, costs do not vary in proportion to the number of calls carried over local loops. The separations rules allocate 25 percent of most LECs' (including Ameritech's) common line costs to the interstate jurisdiction, and 75 percent to the intrastate jurisdiction.[4] Under the Part 69 Rules, LECs recover the portion of the cost of common lines that is allocated to the interstate jurisdiction through two charges: (1) end users pay a flat monthly charge per line called the subscriber line charge (SLC) or end user common line charge; and (2) IXCs pay a per-minute charge called the carrier common line (CCL) charge. The Part 69 access charge rules require a LEC to set the monthly SLC assessed to residential customers and business customers that subscribe to one local exchange service line at $3.50 per month or the actual allocated cost of the loop, whichever is lower.[5] Business customers that subscribe to two or more lines, sometimes referred to as multi-line business customers, are subject to a subscriber line charge that may not exceed $6 per line, or the actual allocated cost of the loop, whichever is lower.[6]

7. The CCL charge is customarily billed by the LEC based upon the IXCs' minutes of use measured at the end office switch. As implemented by Ameritech, the CCL charge is designed to recover four types of costs.[7] First, it recovers the interstate portion of the cost of providing local loops that is not recovered by the SLC paid by end users.[8] Some 63.4 percent of Ameritech's CCL revenues represent amounts needed to cover that cost. Second, the CCL charge recovers the cost of long-term support (LTS) payments remitted by Ameritech to the National Exchange Carrier Association (NECA) to reduce the common line

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[4] 47 C.F.R. § 36.154(c). The jurisdictional separations rules, located at 47 C.F.R. Part 36, allocate telephone company investment and expenses between interstate and intrastate operations. The costs allocated to the interstate jurisdiction determine the total interstate revenue requirement to be recovered through interstate access charges. (Even under the current price cap rules, 47 C.F.R. §§ 61.41-61.49, subscriber line charges are still computed based on the costs allocated through the separations process. *See* 47 C.F.R. §§ 69.1(c), 69.104.)

[5] 47 C.F.R. § 69.203(a).

[6] 47 C.F.R. § 69.104(d).

[7] Letter from Cronan O'Connell, Director, Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC (June 2, 1995) (Ameritech June 2 *Ex Parte*). Most other LECs recover the same costs with their CCL charge, with the exception of the intrabuilding cable charge.

[8] Ameritech's total annual interstate allocation of common line costs is referred to as the "base factor portion." The "base factor portion overflow" describes the portion of these costs that are not recovered from the SLC and therefore are recovered through the CCL.

charges of rural and other high cost LECs remaining in the NECA common line pool.[9] These LTS charges make up 22.3 percent of Ameritech's CCL revenues. Third, part of the CCL charge recovers costs associated with public payphones, which constitutes 10.8 percent of Ameritech's CCL revenues. Fourth, Ameritech's CCL charge recovers certain inside wire costs associated with intrabuilding cable.[10] These costs make up the remaining 3.5 percent of Ameritech's CCL revenues.[11]

8. The second charge at issue here is the transport interconnection charge (TIC). Transport charges in access service tariffs recover interstate costs of transmission and tandem switching between end office switches and IXC points of presence. Historically, transport charges were recovered on a per-minute basis, even though many transport facilities were dedicated to the use of individual IXCs. In 1992, the Commission restructured transport rates to make them more economically rational. The new rate structure required LECs to establish flat rates per trunk to recover the non-traffic sensitive cost of certain dedicated transport facilities and to price most transport services based on the pre-existing rates for comparable special access services.[12] These restructured transport rate elements recovered

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[9] Until 1989, the Commission's rules required all LECs to participate in a nationwide CCL pool. Under this arrangement, NECA computed a nationwide CCL charge, based on the average of the CCL costs of all LECs, and all LECs assessed that uniform charge. The revenues generated by the CCL charges were pooled and each LEC received revenues from the pool based on its individual CCL costs. That mandatory pooling arrangement was replaced in 1989 by a system that permitted LECs to leave the pool and set their CCL rates based on their own common line costs. Under this new system, however, the Commission required LECs that withdrew from the common line pool, including Ameritech, to collect LTS amounts in their CCL charges. These amounts are remitted to and distributed by NECA to LECs remaining in the nationwide pool, so that the uniform CCL rate assessed by these LECs is no higher than it would have been if all LECs were still participants in the pool. *See* 47 C.F.R. §§ 69.603(e), 69.612.

[10] Pursuant to an order of the Illinois Commerce Commission, certain costs for intrabuilding cable and terminals beyond the first terminal of a building (generally related to switching equipment in large office buildings) have been reclassified as capitalized "Station Connection" investment and were not retired along with Ameritech's other inside wire investment. Instead, Ameritech continues to recover these costs through the CCL charge. *See Ameritech Operating Companies Tariff F.C.C. No.* 2, Memorandum Opinion and Order, 4 FCC Rcd 5524 (1988).

[11] The jurisdictional separations process allocates a certain portion of Ameritech's common line costs to the interstate jurisdiction. According to Ameritech, our price cap rules do not permit Ameritech to recover the full amount of its common line costs allocated to the interstate jurisdiction. Ameritech states that the percentages listed in this section are based on the level of costs that our price cap rules permit Ameritech to recover rather than the amount allocated through the jurisdictional separations process (the LTS amount was held constant, while the other three components were reduced by the same proportions). Ameritech June 2 *Ex Parte*.

[12] For a more detailed explanation of the transport rate restructure, see *Transport Rate Structure and Pricing*, Third Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 3030 (1994).

much less revenue than the historic per-minute transport charges. Consequently, the Commission created the transport interconnection charge, initially priced on a residual basis, so that the transport rate restructure *per se* would not change the amount of revenues recovered by the LECs for transport services, *i.e.*, the restructure was intended to be revenue-neutral to the LECs. The per-minute transport interconnection charge applies to all minutes of access traffic using the LEC switched access network, including traffic passing over LEC transport facilities as well as traffic passing over competitive access providers' transport facilities and interconnected with the LEC switched access network. As with the CCL charge, the TIC is assessed on the basis of IXC minutes measured at the end office switch.

9. The price cap rules in Part 61 of the Commission's Rules give LECs that are subject to price caps, such as Ameritech, a degree of flexibility in establishing the level of some of their access rates.[13] The rules split interstate services into discrete groups called baskets. Price cap carriers have some flexibility in establishing the amount of charges for elements or services that are included in the same basket as long as the actual price index for the basket does not exceed the price cap index for that basket. Pricing flexibility is generally limited by banding rules that establish separate upper and lower pricing bands for each service category within a basket.[14] Local switching and the transport interconnection charge are classified as service categories in the traffic sensitive and trunking baskets, respectively.[15]

10. Our access charge rules further require that the CCL charge, transport interconnection charge, and most other access charges, be uniform throughout a LEC study area (*i.e.*, that they be geographically averaged). A study area generally comprises all of a LEC's service area within a particular state.[16] The access charge rules originally prohibited any deaveraging of access charges within a study area.[17] In the *Special Access Expanded Interconnection Order*, however, the Commission authorized LECs to establish a system of traffic density-related rate zones within a study area, with different special access rates in each zone, once a LEC provided as few as one operational cross-connect to a competing

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[13] 47 C.F.R. §§ 61.41-61.43, 61.45-61.47.

[14] 47 C.F.R. §§ 61.47(e), (g), (h). LECs may be permitted to price above or below the pricing bands upon a proper showing.

[15] 47 C.F.R. §§ 61.42(e)(1)(ii), 61.42(e)(2)(vi).

[16] *Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7452 ¶ 174 n.403 (1992) (*Special Access Expanded Interconnection Order*).

[17] 47 C.F.R. § 69.3(e)(6).

special access provider in that study area.[18] LEC central offices in areas with the highest traffic densities were assigned to Zone 1; offices in areas with intermediate degrees of density were assigned to Zone 2; and offices in areas with the lowest density were assigned to Zone 3.[19] The Commission subsequently authorized LECs to use the same zones for purposes of establishing divergent rates in different zones for some transport charges, but not the transport interconnection charge.[20]

B. The Modification of Final Judgment

11. Ameritech, as one of the Regional Bell Operating Companies (RBOCs), was barred under the MFJ that settled the antitrust suit brought by the DOJ against AT&T in 1974 from providing communications services that originate in one Local Access and Transport Area (LATA) and terminate in another. The purpose of this restriction was to prevent the RBOCs from using their control over bottleneck local exchange facilities to discriminate among long-distance providers, thereby depriving consumers of a free choice of long-distance providers. The MFJ was recently superseded by the Telecommunications Act of 1996, although the Act prohibits an RBOC from providing in-region interLATA service until it has met specified criteria.[21]

C. Similar Proposals By Other LECs

12. Like Ameritech, two other LECs, Rochester Telephone Corporation (Rochester) and the NYNEX Telephone Companies (NYNEX), recently requested waivers to modify their interstate access rate structures in order to respond to increased local competition in their service territories. In those cases, the growth in alternative providers of access and local services was largely the result of steps that the New York Public Service Commission (New York Commission), NYNEX, and Rochester had taken to facilitate local

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[18] *Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7454-57 ¶¶ 178-185.

[19] LECs have flexibility in defining the density levels and other factors used to determine which central offices are assigned to each of these zones.

[20] *Expanded Interconnection with Local Telephone Company Facilities*, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374, 7426-29 ¶¶ 98-104 (1993) (*Transport Expanded Interconnection Order*).

[21] *See supra* note 1.

competition. We granted waivers to Rochester in March 1995,[22] and to NYNEX in May 1995.[23]

13. In 1993, Rochester proposed an "Open Market Plan" to restructure its provision of services to end users and other carriers in a manner intended to foster local exchange competition. The New York Commission approved a modified version of the plan in November 1994, and the plan went into effect on January 1, 1995.[24] Under the plan, Rochester restructured to form two subsidiaries: (1) the regulated basic network services firm, which retains the Rochester name, and (2) a lightly regulated retail provider, called Frontier Communications. Under the plan finally approved by the New York Commission, however, Rochester continues to provide interstate access and retail intrastate services on a fully regulated basis. In addition, Rochester is providing unbundled local loops and other functions that resellers need to provide local exchange service and intrastate services at discounted wholesale prices. Competing providers may resell Rochester's local loops and other network functions, or may provide such facilities themselves. Frontier initially offered only Centrex, high-capacity private line, and unregulated voice mail services. Frontier and other retail local service providers are free to provide any service to end user customers currently served by Rochester.

14. In July 1994, Rochester sought certain limited waivers of our access charge rules to harmonize the application of those rules with the plan implemented at the intrastate level. In March 1995, the Commission granted a Part 69 waiver that permits Rochester to adjust the manner in which it collects three types of interstate access charges when another carrier resells Rochester's lines to end users (*Rochester Waiver Order*). Rochester is permitted to collect, from the reseller instead of the end user, both the SLC and the charge for changing presubscribed long-distance carriers. This reflects the fact that the reseller, not Rochester, will have the direct relationship with the end user. In addition, competing local service providers that purchase Rochester's subscriber lines, but not its local switching services, will be charged a flat-rate CCL charge based on the average level of interstate traffic on Rochester's own subscriber lines.

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[22] *Rochester Tel. Corp. Petition for Waivers to Implement Its Open Market Plan*, Order, 10 FCC Rcd 6776 (1995) (*Rochester Waiver Order*).

[23] *The NYNEX Tel. Cos. Petition for Waiver, Transition Plan to Preserve Universal Service in a Competitive Environment*, Memorandum Opinion and Order, 10 FCC Rcd 7445 (1995), *reconsideration pending* (*NYNEX USPP Order*).

[24] *Petition of Rochester Tel. Corp. for Approval of Proposed Restructuring Plan*, Opinion and Order Approving Joint Stipulation and Agreement, Case 93-C-0103, Opinion No. 94-25 (N.Y. Pub. Serv. Comm'n Nov. 10, 1994).

15. In December 1993, NYNEX filed a petition seeking substantial changes in the manner in which it recovers some of its access charges in the face of increasing competition. The Commission granted a modified version of the requested waiver in May 1995 (*NYNEX USPP Order*).[25] The Commission found that competitive circumstances in the LATA that includes New York City and the surrounding metropolitan area justified waivers of certain of the access charge rules within that area. In particular, the Commission found that the New York Commission and NYNEX had taken steps to remove significant barriers to the growth of competition in the access and exchange markets. Moreover, competitive service providers are actively offering various services to a greater extent in the New York City area than elsewhere in NYNEX's region or in most parts of the country. As a result of these special circumstances, the Commission concluded that certain access charges -- in particular, the CCL and transport interconnection charges -- create uneconomic incentives for customers to shift traffic from NYNEX's switched network to potentially less efficient competitors, and may stimulate unproductive investment. Therefore, the Commission allowed NYNEX to eliminate the portion of the CCL charge that recovers common line costs associated with interstate calls originated by or terminated to multi-line business customers. NYNEX was authorized to recover those costs through a flat rate charge assessed on all long-distance carriers based on their relative share of presubscribed subscriber lines in the New York City area. We also permitted NYNEX to eliminate the portion of the CCL charge attributable to NYNEX's long-term support payments, and to recover these costs from IXCs based on their respective shares of interstate minutes of use originating and terminating in the area. Finally, we allowed NYNEX to reduce the transport interconnection charge by a greater amount in particular zones in the New York City area than it reduces the charge elsewhere in its region.

D. The Customers First Plan

1. Overview

16. On March 1, 1993, Ameritech filed a petition[26] proposing what Ameritech refers to as "Customers First: Ameritech's Advanced Universal Access Plan," which would require regulatory actions by the FCC and state commissions, as well as a waiver of the MFJ by the MFJ court. Ameritech filed voluminous supporting material for its petition in April, 1993. Ameritech originally sought to implement Customers First on a statewide basis in all five states in Ameritech's region -- Illinois, Michigan, Ohio, Indiana and Wisconsin. On April 12, 1995, however, Ameritech filed an update to its plan that narrowed the geographic scope of its proposal to Illinois and Michigan, and presented additional information in

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[25] *See NYNEX USPP Order*, 10 FCC Rcd 7445.

[26] Petition for a Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region (filed Mar. 1, 1993) (Petition).

support of its request.[27] Ameritech has taken and proposes to undertake a variety of steps that could facilitate competitive entry in the local exchange telephone market. In return, Ameritech seeks various waivers from the FCC, and a waiver from the MFJ court enabling Ameritech to provide interexchange service.[28] Ameritech's proposals are described in greater detail below.[29]

17. Ameritech's waiver petition summarizes its proposals for opening its network to facilitate local exchange competition. Specifically, Ameritech proposes to unbundle the elements of its local exchange and interoffice network, and make these elements available to parties that seek to provide competing local telephone service. The elements that Ameritech would make available for purchase are: local loops, local switching, dedicated transport, common transport, and SS7 call setup.[30] In addition, Ameritech proposes the establishment of reciprocal compensation agreements for terminating local traffic between Ameritech and new providers of local exchange services.[31] Ameritech also states in its Petition that it will offer exchange support functions such as 911, directory assistance, and operator services on a contractual basis to carriers that offer switching.[32] Ameritech would relinquish its role as central office code administrator for its region and would transfer control of number

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[27] Update to Ameritech's Customers First Waiver Request (filed Apr. 12, 1995) (Update).

[28] In its initial filing with this Commission, Ameritech indicated that it would not implement unbundling and interconnection unless and until it received a waiver of the MFJ to provide interexchange service. Petition at 23 ("Unbundling and interLATA authorization must be simultaneous for Ameritech's proposal to deliver its promised benefits."). In its Update, Ameritech does not specifically address any link between receiving interexchange authority and network unbundling. In its Customers First tariff filing with the Illinois Commerce Commission, Ameritech specifically conditioned the effectiveness of the tariffs on its receipt of a waiver of the MFJ for interexchange service. The Illinois Hearing Examiner's Proposed Order rejected this linkage. *Illinois Bell Tel. Co. Proposed Introduction of a Trial of Ameritech's Customers First Plan in Illinois*, Case No. 94-0096, Proposed Order at 34-35 (Ill. Comm. Comm'n Jan. 24, 1995). In its Brief on Exceptions to the Hearing Examiner's Proposed Order, Ameritech stated that it would not challenge this finding before the full Illinois Commerce Commission. Brief on Exceptions of Illinois Bell Telephone Company, at 34-35, *Illinois Bell Tel. Co., Proposed Introduction of a Trial of Ameritech's Customers First Plan in Illinois*, Case No. 94-0096, (Ill. Comm. Comm'n Feb. 8, 1995). The Michigan Public Service Commission similarly rejected Ameritech's interLATA linkage condition. *Application of City Signal, Inc. for an Order Establishing and Approving Interconnection Arrangements with Ameritech Michigan*, Case No. U-10647, Opinion and Order, at 9, (Mich. Pub. Serv. Comm'n Feb. 23, 1995) (Michigan Order).

[29] *See infra* paras. 25-34.

[30] Petition at 13.

[31] *Id.* at A-3.

[32] *Id.* at 14.

assignment to a third party.[33] Finally, Ameritech asserts that it will guarantee fair pricing of local loops and switching capabilities[34] and nondiscrimination in the provision of the unbundled services.

18. We solicited public comment on Ameritech's Petition and Update. Comments to the Petition were submitted on June 11, 1993 and replies on July 12, 1993. Comments to the Update were submitted on May 16, 1995 and replies on May 31, 1995.

2. Department of Justice InterLATA Trial

19. As part of its initial filing, Ameritech requested that this Commission issue a declaratory ruling that the provision of interexchange service by Ameritech would serve the public interest.[35] On April 3, 1995, after extensive negotiations with Ameritech and discussions with other parties, the DOJ submitted to the U.S. District Court for the District of Columbia a Proposed Order for a trial waiver of the MFJ. Grant of the waiver would have allowed Ameritech to offer interLATA services on a trial basis in the portion of the Chicago LATA that is located in Illinois, and in the Grand Rapids, Michigan LATA.[36] Ameritech would have been permitted to offer this service only through a structurally separate subsidiary, and only after the DOJ determined that no substantial possibility existed that Ameritech's entry would have impeded competition in the interLATA market.[37] On May 31, 1995, we filed an *amicus curiae* brief with the MFJ court generally supporting the

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[33] *Id.* Subsequent to Ameritech's proposal, the Commission issued an order mandating that Ameritech's responsibilities as central office code administrator, as well as those of other LECs, be transferred to a new North American Numbering Plan administrator. *Administration of the North American Numbering Plan*, Report and Order, FCC 95-283, CC Docket No. 92-237, ¶¶ 73-80 (released July 13, 1995).

[34] Ameritech notes that the pricing of unbundled loops and switching capability is a matter for state regulators. Petition at 15.

[35] *Id.* at 18-19.

[36] Preliminary Memorandum of the United States In Support of a Motion for a Modification of the Decree to Permit a Limited Trial of Interexchange Service by Ameritech, *United States v. Western Elec. Co.*, Civ. Action No. 82-0192 (HHG) (filed Apr. 3, 1995) (DOJ Proposed Order). DOJ subsequently filed a more detailed memorandum with the MFJ court in support of its preliminary memorandum. Memorandum of the United States in Support of Its Motion for a Modification of the Decree to Permit a Limited Trial of Interexchange Service by Ameritech, *United States v. Western Elec. Co.*, Civ. Action No. 82-0192 (HHG) (filed May 1, 1995) (DOJ Supporting Memorandum).

[37] DOJ Proposed Order ¶¶ 19-20.

principles of the DOJ Proposed Order.[38] The MFJ court has not acted on Ameritech's request. Because the Telecommunications Act of 1996 supersedes the MFJ, the DOJ waiver process no longer governs the terms of RBOC interLATA entry.[39]

3. State Actions

20. On April 7, 1995, the Illinois Commerce Commission (Illinois Commission) issued an Order addressing both the Customers First tariffs filed by Ameritech as well as related issues that were under review in separate proceedings.[40] The tariffs filed by Ameritech indicated that they would become effective upon Ameritech's receipt of a waiver of the MFJ to provide interexchange service. The Illinois Commission rejected this condition as an improper restraint on its authority to establish regulations for the provision of local exchange service in Illinois.[41] It also rejected Ameritech's unbundling tariff that would have required a party to purchase entire loops. The Illinois Commission found that unbundling sub-elements of loops (such as feeder and distribution plant) upon bona fide request would better serve the public interest because a competing carrier may be capable of replicating part of the local loop and would need to purchase from Ameritech only the portion it cannot replicate.[42] Although the Illinois Commission generally found that subloop unbundling would serve the public interest, it concluded that issues arising out of requests for subloop unbundling would be addressed in a pending rulemaking proceeding on line side interconnection.[43] In addition, the Illinois Commission rejected Ameritech's initial tariff for the pricing of unbundled network elements because the sum of the charges for the unbundled elements would have exceeded the total price of the bundled line providing the same functionalities, thus resulting in a possible price squeeze for competitors.[44]

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[38] Memorandum of the Federal Communications Commission as Amicus Curiae in Support of Motion for Modification of Decree to Allow Limited Trial of Interexchange Service By Ameritech, *United States of America v. Western Elec. Co.*, Civ. Action No. 82-0192 (HHG) (May 31, 1995).

[39] *See supra* para. 11.

[40] *Illinois Bell Tel. Co., Proposed Introduction of a Trial of Ameritech's Customers First Plan in Illinois*, Order, Docket No. 94-0301 (Ill. Comm. Comm'n Apr. 7, 1995) (Illinois Order).

[41] *Id.* at 37.

[42] *Id.* at 47-48.

[43] *Id.* at 48.

[44] *Id.* at 60-61. A price squeeze can occur when an entity that provides both a retail product and a necessary input for providing that retail product possesses market power over the input. A price squeeze exists when the price of the input product is so high, relative to the price of the retail product, that competing

(continued...)

21. The Illinois Commission generally approved the technical parameters for end-office integration between Ameritech and its competitors.[45] It agreed with Ameritech that Ameritech and new local exchange providers should compensate each other at the same rate for terminating each other's traffic, but rejected Ameritech's proposal to use switched access rates as a basis for such reciprocal compensation because these rates would prevent competitors "from providing local exchange service in a financially viable manner."[46] The Illinois Commission also concluded, contrary to Ameritech's assertions, that a new provider of local exchange service would initially terminate much more traffic on Ameritech's network than Ameritech would terminate on the new local service provider's network. Consequently, even if both carriers paid the same reciprocal compensation rates, new local service providers would end up making substantial net payments to Ameritech, thereby creating the possibility of a price squeeze in which new entrants would be unable to establish competitive prices for local exchange service.[47] The Illinois Commission therefore adopted a reciprocal compensation rate structure based on Ameritech's actual long run service incremental costs for providing termination services.[48] The Illinois Commission also directed Ameritech to tariff interim number portability mechanisms and to participate in an industry task force to develop a long term solution to this problem.[49] Finally, in an interim order for which hearings were consolidated with the Customers First hearings, the Illinois Commission ordered Ameritech to implement intraLATA toll presubscription within one year of the issuance of the order.[50]

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[44](...continued)
providers of the retail service are unable to make a profit. *See* Janusz A. Ordover & Garth Saloner, *Predation, Monopolization, and Antitrust*, in 1 Richard Schmalensee & Robert Willig, *Handbook of Industrial Organization*, 537, 565-70 (1989); T.G. Krattenmaker and Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L.J. 209 (1986); Steven Salop and D.T. Scheffman, *Raising Rivals' Costs*, 73 American Econ. Rev. 267 (1983). Although the Illinois Commission discounted the concerns expressed by some parties about the likelihood of a price squeeze, the Illinois Commission concluded that the pricing rule it imposed would reduce the possibility that a price squeeze would occur. *Id.*

[45] Illinois Order at 79-81.

[46] *Id.* at 96.

[47] *Id.* at 96-98.

[48] *Id.* at 98.

[49] *Id.* at 109-10. The Commission has initiated a proceeding to examine the costs and benefits of both interim and various longer-term number portability solutions. *See Telephone Number Portability*, Notice of Proposed Rulemaking, 10 FCC Rcd 12350 (1995).

[50] *Intra-Market Service Area Presubscription and Changes in Dialing Arrangements Related to the Implementation of Such Presubscription*, Interim Order at 20 (Ill. Comm. Comm'n Apr. 7, 1995).

22. Ameritech refiled its tariff to comply with the Illinois order on May 22, 1995. The tariff went into effect on one day's notice, and is currently effective, but several parties petitioned the Illinois Commission to begin an investigation. On June 21, 1995, the Illinois Commission initiated an investigation into allegations that certain tariff provisions created a "price squeeze" or were unreasonably discriminatory.[51] If the Illinois Commission determines that any provisions of the tariff are invalid, it will modify those provisions and order refunds to any competitors that purchased services at rates deemed unlawful.[52]

23. The Michigan Public Service Commission (Michigan Commission) addressed many of the issues involved with the Customers First plan in a proceeding that initially focused on establishing interconnection arrangements between Ameritech and US Signal,[53] a new local service provider in Grand Rapids, Michigan.[54] The Michigan Commission granted US Signal's motion to consider in the proceeding other issues involved with local exchange competition in addition to interconnection arrangements. The Michigan Commission found that US Signal, as a competitor to Ameritech, was entitled to interconnect its network with Ameritech's network in a manner comparable to the way independent LECs in neighboring territories interconnect with Ameritech's network.[55] In reaching this decision, the Michigan Commission found unpersuasive Ameritech's attempts to distinguish a carrier operating in an adjacent market from a carrier operating within Ameritech's service area. The Michigan Commission cited with approval testimony from an MCI witness who stated that the same type of transmission link that connects Ameritech with neighboring carriers would also permit Ameritech and US Signal to exchange traffic.[56]

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[51] *Illinois Comm. Comm'n vs. Ill. Bell Tel. Co.*, Citation Order, Dkt. No. 95-0296 (June 21, 1995).

[52] Ill. Ann. Stat. ch. 220, ¶¶ 9-250, 9-252 (Smith-Hurd 1995).

[53] US Signal's local exchange subsidiary is known as City Signal. We use "US Signal" throughout this order for consistency.

[54] Michigan Order. On October 12, 1994, the Michigan Commission granted US Signal a license to provide local exchange service in the Grand Rapids District exchange. Michigan law required US Signal to have an interconnection agreement with Ameritech before US Signal could begin providing service. US Signal was unable to reach agreement on interconnection with Ameritech and requested that the Michigan Commission establish the terms of such agreement after a hearing. At the same time, US Signal filed a motion asking the Michigan Commission to establish transitional co-carrier interconnection arrangements with Ameritech. The Michigan Commission granted this motion, and in the course of the proceeding, established several interim rules governing the entry of new providers of local exchange services into Michigan's local exchange market. *Id.*

[55] *Id.* at 17.

[56] *Id.* at 17-18.

24. The Michigan Commission also ordered Ameritech to unbundle its loops from its switches, concluding that it is unreasonable to expect a new entrant initially to be able to rely on its own facilities to serve all customers in an area.[57] In addition, the Michigan Commission concluded that the pricing of unbundled loops and other network functionalities should be determined by the total service long run incremental cost (TSLRIC) for each functionality.[58] With regard to number portability, the Michigan Commission required Ameritech to offer interim solutions to number portability at a "transitional price" that would be based on incremental costs.[59] Finally, the Michigan Commission found that until it can adopt permanent rules governing interconnection by competitors, the interconnection arrangements between Ameritech and US Signal would be the tariffed terms under which other new state-certified providers of local exchange service could interconnect with Ameritech.[60] Ameritech has filed a tariff to implement the requirements of the Michigan Order, and that tariff is now in effect.[61]

4. Ameritech's Waiver Requests

a. Overview

25. The waivers Ameritech requests from this Commission fall into two categories: restructuring of certain access charges, and pricing flexibility. Access charge restructuring refers to the recovery of certain costs, currently embedded in per-minute

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[57] *Id.*

[58] *Id.* at 55-57.

[59] *Id.* at 67.

[60] *Id.* at 83-84.

[61] Ameritech's initial tariff filings in response to the Michigan order were rejected by Michigan Commission staff on the grounds that Ameritech proposed to permit interconnection only on the basis of virtual collocation, rather than allowing an alternate mechanism proposed by US Signal. Letter from Anthony M. Alessi, Director, Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC (August 10, 1995) (Ameritech August 10 *Ex Parte*); Letter from Martin W. Clift, Jr., Director Regulatory Affairs, US Signal Corp., to William F. Caton, Acting Secretary, FCC (July 26, 1995) (US Signal July 26 *Ex Parte*); Letter from William J. Celio, Director Communications Division, Michigan Public Service Commission, to Gail Torreano, Vice President, Regulatory and Governmental Relations, Ameritech Michigan (June 13, 1995) (attached to US Signal July 26 *Ex Parte*). The Michigan Commission subsequently ordered Ameritech to provide an alternate method of interconnection. *Application of City Signal, Inc. for an Order Establishing Interconnection Arrangements with Ameritech Michigan*, Case No, U-10647, Order Clarifying Prior Order (Michigan PSC, Oct. 3, 1995) (Michigan Clarification Order). Ameritech filed a revised tariff in response to the Michigan Clarification Order that was accepted by the Michigan Commission staff and is now in effect. Letter from Nancy M. Short, Director, Public Policy, Ameritech to William J. Celio, Director, Communications Division, Michigan Public Service Commission (Oct. 13, 1995).

switched access rates paid by IXCs, through a flat charge on IXCs based on their market shares. To accomplish this, Ameritech seeks waivers of Part 69 of the Commission's Rules to remove certain revenues from the CCL charge and the transport interconnection charge, and to establish new rate elements that would be billed to IXCs by a third party billing agent based on their share of total interstate retail toll minutes, regardless of their use of Ameritech's access services. Ameritech also raised the possibility that these costs could be allocated back to the services to which they belong and recovered outside of per-minute interstate access charges to IXCs. With respect to pricing flexibility, Ameritech requests that its transport and switching services be immediately removed from price cap regulation and that it be permitted to implement rate changes for these services without cost support and on one day's notice. In addition, Ameritech seeks waivers that would permit it to deaverage its switched access services by geographic zones, and to offer term, volume, and growth discounts on various services.

26. Ameritech contends that the removal of legal barriers to local exchange competition on the state level and the unbundling of its network will rapidly produce competition in all aspects of its local exchange and exchange access business. Ameritech maintains that its unbundled network is now vulnerable to bypass by IXCs that can either obtain exchange access from other local carriers (who may be reselling Ameritech's service) or provide their own access by purchasing unbundled functionality from Ameritech. Ameritech argues that because the CCL and TIC are collected based on minutes of use measured at Ameritech's local switches, to the extent that these charges reflect non-cost-based elements, customers will have an incentive to shift to competitors' local switches for access. Under these circumstances, Ameritech argues that IXCs can and will avoid paying per-minute rates for switched access as long as those rates recover costs unrelated to the service. According to Ameritech, bypass of its switched access service to avoid payment of non-cost-based rate elements will have two effects.[62] First, as users who have paid higher rates that include subsidies switch to other carriers whose rates are not required to include such subsidies, the funding base for those subsidies will evaporate. Second, maintenance of the current Part 69 rate elements will encourage entry by carriers that may be less efficient than Ameritech, solely because such carriers need not contribute to the existing subsidy mechanisms. Ameritech states that such inefficient entry would raise the cost to society of providing telecommunications service. Thus, Ameritech argues that the waivers it seeks from the Commission are a necessary corollary to the unbundling taking place at the state level.

[62] Petition at 11.

b. Access Charge Restructuring

27. Ameritech maintains that the network unbundling and interconnection that it proposes in its Customers First Plan and has implemented pursuant to the Illinois and Michigan Orders, has produced, and will continue to produce, increasingly vigorous competition in the provision of switched access. In this competitive environment, Ameritech claims that it will be forced to charge artificially high interstate switched access rates due to Commission regulations that require it to recover certain costs in its switched access rates that are unrelated to the provision of switched access. Specifically, Ameritech identifies several components of its CCL and TIC that it asserts are unrelated to the provision of those services. Ameritech maintains that, in a competitive environment, it would be inefficient and inequitable for it to continue to be the only local carrier to impose these surcharges in its interstate switched access rates.

28. To remedy this alleged competitive imbalance, and pending comprehensive reform of the access charge rules, Ameritech proposes a "bulk billing" mechanism that would require all IXCs that purchase interstate switched access services whether from it or from a competing provider to pay Ameritech (through an independent third party) their proportionate shares of the public policy costs now embedded in these rates, thereby removing these costs from Ameritech's per-minute switched access rates. Ameritech asserts that this mechanism would operate as an interim measure until comprehensive proceedings can be conducted to address these access charge issues.

29. Ameritech argues that the components of its CCL charge that recover a portion of Ameritech's interstate loop costs and fund Ameritech's long-term support contributions to NECA are costs imposed by public policy, and should be recovered through bulk billing because they are not borne by Ameritech's competitors in their rates for switched access.[63] Similarly, Ameritech proposes to split the revenues recovered through the TIC in half, and to label one half the "Switched Transport Surcharge," to continue to be recovered from Ameritech's switched access customers. The other half of the TIC revenues, which Ameritech refers to as the "Public Policy Element," would be recovered through a bulk billing mechanism under Ameritech's plan.[64] Ameritech contends (without providing quantitative support) that the bulk-billed portion of the TIC would recover costs that have been misallocated (or unnecessarily incurred) as a result of regulatory mandates.[65]

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[63] *See supra* para. 6 for a fuller description of these charges.

[64] Update at 16-17.

[65] According to Ameritech, these costs include the following: First, Ameritech submits that the TIC recovers a portion of the costs of tandem switching that are not recovered through the tandem switching charge under the interim transport rate structure. The interim transport rate structure and pricing rules directed that the (continued...)

30. Under Ameritech's proposal, each IXC with a Carrier Identification Code (CIC) would be billed for a share of the following: (1) the Ameritech loop and LTS revenues formerly recovered in the CCL; (2) TIC revenues that Ameritech calls the Public Policy Element; and (3) the administrative costs incurred in recovering these charges. Each IXC would pay, on a monthly basis, its share of this total amount based on its share of the total interstate switched access minutes originating and terminating in the territory covered by the waiver. Ameritech proposes that, in the first year of implementation, it would calculate the total amount to be collected and would perform the bulk billing itself. In subsequent years, an independent organization, to be established within the first year after the Customers First plan goes into effect, would determine the total amount to be recovered and each carrier's share, and would perform the collection and distribution functions.[66] To calculate each IXC's share of the bulk billing amount, this independent organization would determine the respective IXC's share of the interstate switched retail toll minutes of use (MOU) originated or terminated in the territory covered by the waiver, based on an annual report from each IXC.[67] The independent organization would collect the revenues and remit the

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[65](...continued)
initial rate for the tandem switching component of tandem-switched transport be set to recover 20 percent of the fully allocated costs of tandem switching.

Second, Ameritech contends that the TIC also recovers a portion of the transmission costs associated with tandem-switched transport. Under the interim transport rules, the initial per-minute rate for the transmission component of tandem-switched transport was derived from the flat rates for comparable direct-trunked transport using a conversion factor of 9000 minutes of use (MOU) per voice-grade circuit. Ameritech contends that its actual fill factor is closer to 7000 MOU per circuit. If a lower conversion factor had been used, the initial rate for tandem-switched transport would have been higher, and the TIC would have been lower by a corresponding amount.

Third, Ameritech argues that the "equal charge per minute" transport pricing rule, which the interim transport rate structure superseded, created incentives for IXCs to use transport facilities inefficiently, as compared with special access service. (The equal charge rule, which was imposed by the MFJ, required LECs to charge usage-sensitive rates even for the use of dedicated facilities, the costs of which are not affected by the amount of traffic carried over them. *See Transport Rate Structure and Pricing*, Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 5341, 5344 ¶ 13 (1991) (concluding that equal charge rule did not reflect the manner in which LECs incurred costs).) When the initial transport rates under the interim rate structure were based primarily on comparable special access rates, the allegedly elevated costs associated with these inefficiencies had to be recovered through the TIC.

[66] Update, Attach. D. Ameritech describes its plan as an interim response to alleged inefficiencies created by the existing access rate structure, although Ameritech does not place a time limit on the waivers it requests.

[67] Ameritech proposes to include in the calculation only minutes of interstate switched service that originate and/or terminate in the waiver area and that are sold to end users. In Ameritech's original proposal, IXCs' shares would be based on their shares of interstate and intrastate interLATA and intraLATA toll revenues, as reported by the Common Carrier Bureau's "Long-distance Market Shares" report. Petition at A-
(continued...)

total amount to Ameritech each month without providing Ameritech a breakdown of how much each IXC contributed. Ameritech contends that such a bulk payment would prevent it from ascertaining IXCs' proprietary market share data.

31. In calculating the total bulk billing amount for an upcoming year, Ameritech states that it will cap certain components of the bulk billing amount. Specifically, under Ameritech's proposal, the loop costs recoverable through the bulk-billed charge would remain subject to the per-line price cap provided in the price cap rules,[68] and would only vary based on the change in the number of access lines provided by Ameritech. The bulk-billed portion of the TIC would be subject to the same restrictive upper band that the price cap rules apply to the TIC.[69] LTS amounts would be determined by NECA, as they are today.

32. With respect to the entry of new IXCs (such as Ameritech's interexchange affiliate) into the territory covered by the waivers, Ameritech proposes that for the first tariff year after an IXC obtains a CIC and begins providing service, that carrier not be subject to bulk billing. Instead, the new market entrants would be billed the CCL and TIC rates on a per-minute basis, just as they are now. Beginning the following year, the new entrant would participate in the bulk billing arrangement and would be billed monthly based on its market share from the previous year.

33. Ameritech also describes in its Petition an alternative to bulk billing for the recovery of common line costs that it refers to as "allocating costs back to the services to which they belong."[70] Ameritech argues that from an economic perspective, loop costs that are currently recovered through per-minute interstate access charges should be recovered through the flat subscriber line charges paid by end users.[71] According to Ameritech, increasing subscriber line charges to recover these costs would be a superior long-term

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[67](...continued)
13. In the Update, Ameritech proposes to use only the IXCs' interstate toll MOU to apportion the recovery of bulk billed charges. Ameritech states that its proposal to use a third party billing administrator eliminates the need to rely on the Common Carrier Bureau's market share report. Update, Attach. D.

[68] *See* 47 C.F.R. § 61.45(c).

[69] Under the price cap rules, LECs may not increase the TIC by more than the percentage increase in the overall price cap index for the trunking basket. *See* 47 C.F.R. § 61.47(g)(3).

[70] Petition at A-13.

[71] Ameritech Update Reply at 18.

solution. Bulk billing, however, could be implemented quickly and easily, and would address Ameritech's short-term competitive concerns.[72]

c. Pricing Flexibility

34. Ameritech also requests flexibility "to compete on a level playing field" with carriers that it asserts will enter the market in response to Ameritech network unbundling and compete with Ameritech to provide exchange access to IXCs.[73] Ameritech requests waivers to remove its transport and switching services and current interexchange services from price caps, and it requests that the Commission deem these services to be "competitive."[74] In addition, Ameritech seeks permission to: (1) de-average the pricing for these services according to geographic zones; (2) to change the rates for these services on one day's notice without filing cost support information; and (3) to offer contract pricing for these services. Ameritech also proposes to cap the rates for transport, switching, and current interexchange services at the rate of inflation for three years. Ameritech's proposal would have the Commission declare Ameritech's remaining service elements "non-competitive" and would continue to subject these service elements to price caps. The remaining services elements include: (1) the residual carrier common line charge (after the bulk billing elements have been removed);[75] (2) bulk-billed elements; (3) the end user common line charge;[76] and (4) charges for expanded interconnection service. Ameritech also proposes to introduce new, non-mandatory services on 14 days' notice without first receiving a Part 69 waiver for introducing new service elements, and without filing cost support data pursuant to Part 61.[77] The Commission has issued a Notice of Proposed Rulemaking to address issues of LEC pricing flexibility generally,[78] and as noted earlier, this aspect of Ameritech's waiver requests will be the subject of a future order.

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[72] Update at 14-15.

[73] *Id.* at 18.

[74] *Id.*

[75] Under Ameritech's proposal, the remaining costs recovered through the per-minute CCL charge would relate to payphone costs and intrabuilding cable. These costs comprise 14.3 percent of Ameritech's current CCL charge. *See supra* para. 7 for a description of the costs recovered through the CCL charge today.

[76] Ameritech states that "common line recovery would be restricted by applying the cap to an imputed revenue per line figure (to allow for line growth)." Update at 20.

[77] *Id.*

[78] *Price Cap Performance Review for Local Exchange Carriers*, Second Further Notice of Proposed Rulemaking, FCC 95-393 (released Sept. 20, 1995).

III. DISCUSSION

A. Legal Standard for Granting a Waiver and Other General Issues

1. Positions of the Parties

35. Several commenters assert that the Commission lacks jurisdiction over many of the issues raised in the Petition. They contend that the issues of whether an RBOC may enter the long-distance business and whether the MFJ's restrictions should be waived are antitrust questions, within the jurisdiction of the federal courts.[79] The Organization for the Protection and Advancement of Small Telephone Companies and LDDS Worldcom argue that Ameritech must first pursue its Plan with DOJ and the MFJ Court before requesting waivers from the Commission.[80] Others maintain that the issues surrounding unbundling are largely state issues, and hence also outside the purview of the Commission.[81]

36. Some commenters argue that the Petition is premature or repetitive, because similar issues were considered in the Commission's price cap proceeding, and insufficient time has elapsed for the Commission to assess the effectiveness of these regulations.[82] AT&T argues that Ameritech cannot even begin to support the proposed changes to the price cap formulas.[83] Incumbent LECs endorse the Customers First Plan, arguing that it will lead to the development of a wide variety of economical and high-quality telecommunications services.[84] The Arizona Payphone Association similarly supports Ameritech's requests.[85] These commenters submit that there already is substantial access competition, and that such competition will undoubtedly increase.

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[79] *See, e.g.*, AARP Comments at 2-3, 15-16; Illinois Cable Reply at 12; MFS Comments at 2; National Rural Telecom Association Comments at 13-14; Sprint Comments at 3-5; Ohio Consumer's Counsel Reply at 38; Teleport Reply at 2-5; Wiltel Comments at 2 n.1 (arguing, however, that the Commission should issue a Declaratory Ruling as part of a multi-front strategy); AT&T Comments at 44; Citizens for a Sound Economy Comments at 9.

[80] OPASTCO Comments at 10-11; LDDS Worldcom Comments at 7.

[81] *See, e.g.*, Ohio Consumer's Counsel Reply at 38; Teleport Reply at 2-5; Illinois Commerce Commission Comments at 6.

[82] *See, e.g.*, AARP Comments at 4-6, 16; Ohio Consumers' Counsel Comments at 15-17.

[83] AT&T Comments at 41.

[84] *See, e.g.*, Pacific Bell Comments; Bell Atlantic Update Comments; Southwestern Bell Update Comments; USTA Update Comments.

[85] Arizona Payphone Association Comments at 2.

37. Several commenters maintain that given the sweeping nature of the Petition, which raises issues of a national scope such as pricing flexibility and recovery of alleged social subsidies, the appropriate forum for considering the Petition and the type of relief sought is a formal rulemaking proceeding.[86] These commenters ask the Commission to address such issues in a manner more efficient than the waiver process, and seek an evidentiary record on the conditions extant in the nation as a whole. Moreover, they note that the Commission is already grappling with most of these issues in various rulemaking proceedings. Others argue that the Petition is procedurally improper. CompTel claims that Ameritech's request for waiver of almost forty rules to effect a broad restructuring of policy, rather than pleading unique and special circumstances justifying a limited waiver, improperly proposes a "new model" of regulation.[87] ALTS contends that Ameritech's extensive waivers (as compared to those requested in the *NYNEX USPP Order*) can only be granted in a rulemaking proceeding.[88] ICA states that if all of Ameritech's waivers were granted and applied to all RBOCs, the Plan would be the equivalent of a rulemaking.[89]

38. Several commenters object to the use of either a waiver or a rulemaking to address the issues raised by Ameritech's petition. Four of the five state commissions in Ameritech's region propose that the FCC convene a Joint Conference pursuant to Section 410(b) of the Communications Act, with participation limited to the five Ameritech states.[90] These parties argue that such a conference could provide for valuable dialogue in areas such as determination of the competitiveness of services, the streamlined review of tariffs, unbundling, and universal service. The four state commission staffs also urge the FCC to authorize technical conferences to permit Ameritech and the five state commissions to identify and obtain needed information and attempt to negotiate a compromise plan for submission to the FCC.[91] TCG supports the use of informal workshops to resolve issues and suggests that the Ameritech Region Regulatory Committee, which is comprised of the state public utility commissions from the five states served by Ameritech, could conduct such a

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[86] *See, e.g.*, AARP Comments at 3-4; International Communications Association Reply at 2; MCI Comments at 52-54; MCI Reply at 2-3; National Telephone Cooperative Association Comments at 4-7; NYNEX Comments at 20-33; Sprint Comments at 6; John Staurulakis Comments at 5; Time Warner Reply at 4-6; LDDS Worldcom Comments at 17-20.

[87] CompTel Comments at 23.

[88] ALTS Update Comments at 9.

[89] ICA Reply at 4.

[90] Indiana/Michigan/Ohio/Wisconsin Comments at 3; Indiana/Michigan/Ohio/Wisconsin Staff Update Comments at 1. The first round of comments reflected the views of the four commissions, while the second round of comments were submitted by the four commissions' staffs.

[91] Indiana/Michigan/Ohio/Wisconsin Comments at 4.

proceeding.[92] ICA disagrees with such an approach, on the grounds that it represents an asymmetrical strategy to deal with national issues; one that will ultimately disrupt competition on a national basis and will benefit no one but individual companies.[93] The National Rural Telecom Association argues that state authorities have more detailed knowledge of local conditions, and that the Commission should not adopt policies contingent on states adopting policies that encourage intrastate toll competition and abolish the local exchange franchise.[94] GTE and other LECs favor USTA's proposal for reform of the access charge and price cap rules, arguing that the USTA proposal will promote new services, establish a mechanism for adjusting the degree of regulation to match the development of competition in each access market, and preserve universal service.[95]

39. While they generally support the Plan, several LECs argue that it should not be the blueprint for other LEC relief because: (1) access reform and regulatory relief for LECs should proceed without the need for additional removal of barriers to competition as proposed by Ameritech; (2) any LEC unbundling must reflect the specific conditions existing in the various regions, and be based on technical and economic data; and because (3) the extent of unbundling and network integration are largely state matters.[96] The Utilities Telecommunications Council urges the Commission to tailor its decision to the Ameritech region only.[97]

40. Various commenters argue that the Commission should deny Ameritech's petition because of the pending DOJ interLATA trial proposal and the conditions in that proposal. CompTel contends that the Commission should not preempt the DOJ trial by granting waivers of the Commission's rules in the absence of data that Ameritech faces substantial local exchange and exchange access competition.[98] ALTS argues that DOJ's request for an experimental waiver of the interLATA prohibition demonstrates that the Commission should deny the waiver request because DOJ's motion: (1) is not based on the Customer's First Plan Ameritech has presented to the Commission; (2) would create only an

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[92] TCG Comments at 7-8.

[93] ICA Reply at 5-6.

[94] National Rural Telecom Association Comments at 14.

[95] *See, e.g.*, GTE Comments at 16-17; GTE Reply at 5-7. GTE urges the Commission to begin a rulemaking proceeding based upon the USTA proposal. GTE Comments at 17.

[96] Southwestern Bell Comments at 2, 5, 18; Bell Atlantic Comments at 2; Pacific Bell Comments at 12-14.

[97] Utilities Telecommunications Council Comments at 6.

[98] CompTel Update Comments at 2.

experiment subject to termination at DOJ's discretion; and (3) covers only the Chicago and Grand Rapids LATAs. Moreover, ALTS claims that the DOJ's decision to impose conditions of its own design on Ameritech renders the Customers First Plan as proposed moot.[99] AT&T contends that the DOJ's motion presumes that although competition does not exist anywhere in Ameritech's region, competition would be beneficial and should be tested.[100]

2. Discussion

41. Section 1.3 of the Commission's Rules provides the Commission with the authority to grant waivers "if good cause therefor is shown."[101] Courts have interpreted this Rule as requiring petitioners to demonstrate that special circumstances warrant a deviation from the general rule and that such a deviation will serve the public interest.[102] Moreover, the Commission has ample authority to address the issues presented here by ruling on Ameritech's waiver request rather than undertaking a general rulemaking.[103]

42. We conclude that a waiver is the appropriate mechanism for this situation. The requested waivers apply only to one carrier and only to certain areas within two states. Moreover, Ameritech's filings suggest that competition has begun to develop more rapidly in a few areas in the Ameritech region than elsewhere in the country. This geographically-limited showing is more appropriate for a waiver than for a nationwide rulemaking. In addition, for the reasons described below, we conclude that the market conditions in the Chicago and Grand Rapids local telecommunications markets justify granting limited waivers to Ameritech at this time, rather than waiting until we complete broad-based rulemaking proceedings. We find that the pro-competitive benefits likely to result from the grant of these waivers justify our decision to use our waiver authority in this matter. We also note

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[99] ALTS Update Comments at 8.

[100] AT&T Update Comments at 6-8.

[101] 47 C.F.R. § 1.3.

[102] *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

[103] *See, e.g., SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (choice between rulemaking and adjudication should be left to the informed discretion of the administrative agency); *Atochem N. Am., Inc. v. U.S. EPA*, 759 F. Supp. 861 (D.D.C. 1991) (agency choice between rulemaking and adjudication is subject to deferential "abuse of discretion" standard of judicial review).

that we have ample authority to grant waivers that are relatively broad in scope, such as the waivers Ameritech requests.[104]

43. We are not deciding the merits of Ameritech's proposals to unbundle its local exchange network, and we express no views regarding specific aspects of the Illinois and Michigan commissions' decisions in this area. Matters addressed by the state commissions are relevant here, as discussed below, only to the extent that the development of competition for intrastate services affects the competitiveness of markets for interstate services. Contrary to the assertion of some commenters, a Federal-State Joint Conference is not necessary to address waivers of the interstate access charge rules. These issues are squarely within our jurisdiction, and state representatives have had opportunities to express their concerns.

44. Finally, we conclude that the Telecommunications Act of 1996, by establishing requirements for RBOC provision of in-region interLATA services, has rendered moot Ameritech's request for a declaratory ruling with respect to MFJ relief and interLATA entry.[105] For similar reasons, we reject the arguments of commenters that the DOJ Proposed Order somehow precludes or counsels against our granting waivers to allow Ameritech to restructure certain access charges. Although Ameritech argues that its evidence of competitive developments and regulatory reforms support both interLATA entry and certain modifications of access charges, we conclude that these are distinct issues and may be addressed separately. The Telecommunications Act of 1996 sets forth the conditions for RBOC interLATA entry in states in which they offer telephone service. Nothing in the Act is inconsistent with our exercise of our authority to waive our rules in this situation.

B. Special Circumstances: Assessment of the State of Competition

1. Positions of the Parties

45. *In General.* Ameritech argues that the requested waivers should be evaluated based on the likelihood that the development of competition in local telecommunications markets that Ameritech currently dominates will accelerate as a result of the unbundling and related actions Ameritech has undertaken as part of the Customers First Plan.[106] Accordingly, Ameritech argues that grant of the waivers would serve the public interest by allowing Ameritech to respond effectively to competitive entry and by deterring inefficient entrants from capturing significant shares of the market. By contrast, according to

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[104] *See, e.g., NYNEX USPP Order*, 10 FCC Rcd at 7466-67 ¶ 48; *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 834, 862 (1984).

[105] Petition at 18-23.

[106] Ameritech Reply at ii.

Ameritech, application of the existing rules would "deny customers the full benefits of competition, frustrate economic efficiency and development and impair universal service."[107] Thus, according to Ameritech, it is contestability, and not actual competition, that is the critical determining factor. Ameritech's economic expert, David Teece, submits that: (1) access services are competitive, and more importantly, contestable; (2) local exchange services are contestable under the Plan; (3) competition in the local exchange will exert competitive pressures on access services; (4) under the terms of the waiver request, Ameritech will have no ability to harm competition in access services; and (5) authorization of the requested waivers will bring greater, more efficient competition to the marketplace.[108]

46. Other LECs agree with Ameritech's assertion that the grant of regulatory relief should not be premised on findings that particular services are subject to effective competition, but rather as part of the creation of a regulatory regime that can adapt to the inevitable development of effective competition.[109] Many LECs join Ameritech in contending that they are already subject to considerable, and increasing, competition.[110] In addition, they predict substantially increased competitive pressure due to the development of alternatives to their own local exchange and switched access service by wireless telephone and cable companies.[111] As a result of the development of competition that has already occurred, some of the LECs conclude that the extensive unbundling and network integration proposed by Ameritech are not even necessary to promote further competition in local exchange markets.[112]

47. IXCs, competitive access providers (CAPs), cable companies, wireless telephone companies, enhanced service providers, end users, and consumer advocacy groups argue that actual competition should be in place in exchange and access markets before the Commission grants relief to Ameritech.[113] In particular, AT&T submits that DOJ's motion

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[107] Ameritech Update Reply at 7.

[108] *Id.*, App. E, at 2-3.

[109] USTA Comments at 3; Ameritech Update Reply at 5; GTE Reply at 3-4; NYNEX Comments at 4-6.

[110] *See, e.g.*, Bell Atlantic Comments at 2-7; NYNEX Comments at 8-20; USTA Comments at 3.

[111] *Id.*; Southwestern Bell Update Comments at 2.

[112] Southwestern Bell Comments at 6-10.

[113] *E.g.* AARP Comments at 5, 29; ALTS Comments at 4; AT&T Update Comments at 9-22; CompTel Update Comments at 3-12; Fleet Call Reply at 3; Illinois Cable TV Association Comments at 2-5; McCaw Reply at 4-5; LCI Comments at 2; LDDS Worldcom Update Comments at 9-14; MCI Reply at 1; MFS Comments at 4-5; Sprint Update Comments at 15; TCG Update Comments at 5-6, 10-12; Telecommunications Resellers Association Comments at 4; Teledial Comments at 2; WilTel Comments at 3-6.

does not contain an assessment of the current state of competition in Chicago and Grand Rapids, but rather, contains a list of necessary preconditions for competition, and that DOJ proposes to retain the ability to cancel the waiver if competition does not emerge.[114] CompTel, Allnet, and the Ohio Consumers Counsel argue that local interconnection and unbundling will not necessarily lead to competition (particularly if Ameritech engages in strategic pricing and conduct), and therefore, that waivers should not be granted until competition has actually emerged.[115] In addition, Allnet argues that resale of a monopolist's facilities is not the same as effective competition,[116] and the Illinois Cable Television Association argues that niche entry and potential competition are not the same as effective competition, and therefore, that the Commission should not attach the same weight to resale competition and niche entry as it would to facilities-based competition.[117] Finally, MCI argues that the Commission should consider whether sufficient pricing and costing safeguards are in place, and also contends that nascent competition must be allowed "breathing space" prior to relaxation of regulatory controls.[118]

48. The Indiana, Michigan, Ohio and Wisconsin Commissions suggest that the FCC employ the same criteria that they use to assess competitiveness, including, among other things, consideration of the number and size of unaffiliated service providers, with there being at least one such provider, and the availability of functionally equivalent or substitute service at comparable rates, terms and conditions from unaffiliated providers.[119] Many commenters add that there must be an enforceable, meaningful obligation for LECs to provide essential network services and functions to all competitors, including wireless service providers, on an unbundled and nondiscriminatory basis at reasonable rates.[120]

49. *Removal of Barriers to Entry.* Ameritech assesses the contestability of its markets by reference to the conditions for competition that are enumerated in the DOJ

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[114] AT&T Update Comments at 6.

[115] Allnet Comments at 8-12; CompTel Update Comments at 10-11; Ohio Consumers Counsel Comments at 21-29.

[116] Allnet Update Comments at 5.

[117] Illinois Cable Television Association Reply at 1-4.

[118] MCI Update Comments at 15.

[119] Indiana/Michigan/Ohio/Wisconsin Commission Comments at 4.

[120] Fleet Call Comments at 3-5; McCaw Comments at 12-13; North American Telecommunications Association Comments at 4-7.

Proposed Order.[121] Ameritech contends that its compliance with those conditions makes these waivers necessary because large carriers such as AT&T and MCI have filed applications in those states to become certified providers of local exchange services, which will allow them to avoid Ameritech's access charges.[122] Ameritech also argues that the Commission should grant the requested waivers under the same standard the Commission used in the *NYNEX USPP Order*.[123]

50. According to Ameritech, all of the prerequisites for local exchange and switched access competition identified by the DOJ have been implemented in Illinois and Michigan. In particular, Ameritech submits that it is implementing the pre-waiver requirements enumerated in the DOJ Motion in conjunction with the Illinois and Michigan commissions, including: (1) unbundling loops, ports, and other components of its local network (tariffs are effective in both states); (2) implementing intraLATA toll dialing parity (by April 1996 in both states); (3) permitting resale competition; (4) permitting nondiscriminatory access to poles, conduit space, risers, and telephone closets; (5) interconnecting with the networks of competing local service providers and implementing mutual compensation arrangements for termination of local traffic; (6) sharing its directory assistance information; (7) providing interim number portability and working to develop a long-term solution to the problem; and (8) working to assign central office code administration to independent third parties.[124] Ameritech states that it is entering into interconnection agreements with local exchange carrier competitors that provide for mutual compensation in Michigan at $0.015 per MOU, and in Illinois at $0.005 per MOU for direct routed and $0.0075 per MOU for tandem routed traffic, which are significantly lower than the switched access rates it currently charges IXCs.[125] Ameritech also claims that the members of the Illinois Commerce Commission's Number Portability Workshop have unanimously selected a long-term number portability solution for Illinois, and that the implementation schedule is currently under discussion.[126]

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[121] DOJ Proposed Order ¶ 9.

[122] Ameritech Update Reply at 15.

[123] *Id.* at 6 (citing *NYNEX USPP Order*, 10 FCC Rcd at 7462 ¶ 38).

[124] *Id.* at 4-5.

[125] *Id.* For comparison, Ameritech states that its current switched access rates for terminating traffic in Illinois and Michigan are approximately 2.2 cents per minute on average. Telephone conversation with Anthony M. Alessi, Director, Federal Relations, Ameritech (October 12, 1995).

[126] Letter from Anthony M. Alessi, Director, Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC (October 2, 1995) (Ameritech October 2 *Ex Parte*).

51. Ameritech also argues that the elasticity of demand is very high for its switched access and local exchange services -- that customers will switch to alternative providers of such services in response to relatively small changes in prices.[127] According to Ameritech, 85 percent of Ameritech's access revenues are generated by three large and very sophisticated IXCs that have demonstrated their willingness to use CAPs to provide transport services.[128] Similarly, Ameritech argues that elasticity of supply for such services is high -- that alternative suppliers of such services will quickly respond to relatively small changes in prices by offering competing services.[129]

52. The CAPs and IXCs argue that Ameritech has not fully implemented the measures that are necessary to remove barriers to entry and open local exchange and switched access markets to competition.[130] According to MFS, although Illinois and Michigan have taken actions to authorize competitors and establish conditions for interconnections, "these arrangements have not yet been implemented in either state, and to the best of MFS's knowledge, no competitor has begun to provide basic switched service (other than pure resale of Ameritech services) in either jurisdiction."[131] TCG argues that those arrangements will not be implemented in the next few months because: (a) the Illinois tariff "creates more barriers to competition than it removes," which has caused AT&T, MCI, MFS, and TCG to ask the Illinois Commission to conduct an expedited investigation; and (b) the Michigan tariff is inconsistent with the Michigan order.[132]

53. *Competitive Presence*. In addition to its arguments concerning the removal of barriers to entry, Ameritech identifies the following facts to demonstrate that competitors are prepared to compete for a substantial percentage of its exchange and access services in Illinois and Michigan:

- As of January 15, 1996, seven competitive providers have been certified by the Illinois Commerce Commission to offer local exchange service in Illinois, including

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[127] Update at 8-9.

[128] *Id.*

[129] *Id.* at 9-10

[130] *See, e.g.*, Time Warner Update at 17-19; CompTel Update Comments at 3-5, Attach. A (study by Joseph Gillan showing that resale competition is a theoretical possibility for only 4 percent of all access lines due to the absence of wholesale prices, and even then with very low margins); Sprint Update Comments at 13. *See also* MCI Comments at 26-41.

[131] MFS Update Comments at 3.

[132] TCG Update Comments at 2-4; TCG Update Reply at 4.

AT&T, LCI International, MFS, MCI Metro, and TCG.[133] Similarly, five competitors have been certified as providers of local exchange service in Michigan: US Signal, AT&T, LCI International, Southwestern Bell Mobile Services (Cellular One), and Midwest Fibernet.[134]

- According to Ameritech, MFS has installed 7,560 fiber miles of fiber serving 134 buildings in its 124 mile network in Chicago. The current capacity of this network amounts to approximately 10,200-DS1-equivalent circuits.[135] In addition, published reports indicate that MFS is expanding its fiber optic network southward from Chicago into the Naperville area, and north to Deerfield and Northbrook.[136] According to Ameritech, TCG has installed 23,240 fiber miles of fiber serving 114 buildings in its 114 mile network in Chicago. The current capacity of this network is equivalent to 9,700-DS1 circuits. Ameritech also submits that US Signal has constructed 9,680 fiber miles of fiber serving 250 buildings in its 220 mile network in Grand Rapids. The current capacity of this network is equivalent to 4,700 DS1 circuits.[137] Overall, Ameritech claims that as of February 5, 1996, 461 buildings in Chicago and 162 buildings in Grand Rapids are served by at least one competitive access provider.[138]

- Collectively, AT&T, MCI Metro, MFS, and TCG have six end-office-capable switches in Chicago, and US Signal has one such switch in Grand Rapids. AT&T has three additional switches planned for Chicago. Ameritech states that all of these switches are digital electronic switches with modular architectures that can easily be expanded to serve additional lines. Many of those switches, for example, are 5ESS

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[133] Letter from Fred K. Konrad, Director, Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC (Jan. 17, 1996) (Ameritech Jan. 17, 1996 *Ex Parte*).

[134] *Id.* According to Ameritech LCI International requested authority to provide local service in Grand Rapids and throughout the rest of Michigan.

[135] Ameritech July 18, 1995 *Ex Parte*.

[136] Lorryn Rachel, *MFS Communications to Extend Fiber Optics to Naperville Businesses*, Chicago Daily Herald, June 1, 1995, at 3-2, *quoted in* Letter from Anthony M. Alessi, Director, Federal Relations, Ameritech to William F. Caton, Acting Secretary, FCC (July 18, 1995) (Ameritech July 18, 1995 *Ex Parte*).

[137] Ameritech July 18, 1995 *Ex Parte*.

[138] Letter from Anthony M. Alessi, Director, Federal Relations, Ameritech to William F. Caton, Acting Secretary, FCC (Feb. 5, 1996) (Ameritech Feb. 5, 1996 *Ex parte*).

switches manufactured by AT&T, which are capable of serving up to approximately 200,000 access lines.[139]

- Ameritech alleges that CAPs are offering service in 39 of Ameritech's 283 Illinois wire centers, and in 23 of its 340 Michigan wire centers. These wire centers service customers that account for 34 percent of Ameritech's business in Illinois, and 22 percent of its business in Michigan.[140] CAPs have 10 operational access interconnection arrangements in place in Chicago, and three such arrangements in Grand Rapids.[141]

- Existing IXC points of presence are located within 65 of the 283 wire centers in Illinois, giving them access to customers that account for 42 percent of Ameritech's revenue base in Illinois, and in 46 of 340 wire centers in Michigan, providing access to customers that account for 38 percent of its revenues in Michigan.[142]

- Cable companies have facilities in 217 of the areas served by Ameritech's 283 wire centers in Illinois. Customers served by these wire centers account for 88 percent of Ameritech's revenue in that state. Cable companies have constructed facilities in the areas served by 146 of Ameritech's 340 wire centers in Michigan, which serve customers that account for 63 percent of the revenues.[143]

54. Many commenters express considerable skepticism about Ameritech's conclusion that the services offered by current and future entrants will rapidly expand so that most of its services will soon be under competitive pressure. Instead, they argue that a huge financial commitment is necessary to establish a competitive provider, and thus, effective competition (in the form of facilities-based competition) will not emerge for a long time.[144] ALTS argues that competition is unlikely to emerge in Chicago and Grand Rapids as quickly as the Commission determined it would develop in New York City because Chicago and

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[139] Ameritech July 18, 1995 *Ex Parte*.

[140] *Id.*

[141] Ameritech Feb. 5, 1996 *Ex Parte*.

[142] Ameritech July 18, 1995 *Ex Parte*.

[143] *Id.*

[144] CompTel Comments at 5-6; AT&T Comments, Attach. A, at 1.

Grand Rapids are substantially smaller and have correspondingly lower traffic densities.[145] CompTel argues that, even if CAPs have excess capacity to offer some high capacity services, on a market-wide basis, Ameritech's rivals have the transmission or switching capacity to absorb only a minuscule percentage of Ameritech's business.[146]

55. *Emergence of Competition.* Ameritech contends that it already faces competition for a significant share of its business, and that those competitors are poised to challenge Ameritech for most of its revenues. Ameritech maintains that the business customers who purchase special access services from its competitors account for a substantial percentage of its revenues through their purchases of Ameritech's exchange services. Therefore, Ameritech argues that the same conditions that the Commission found in LATA 132 in the *NYNEX USPP Order* are present in Illinois and Michigan.[147]

56. Ameritech submitted promotional materials circulated by AT&T, MCI Metro, MFS, TCG, and US Signal, in Chicago or Grand Rapids, that allegedly show that those companies are positioning themselves as Ameritech's competitors for local telephone services. For example, AT&T sponsored newspaper advertisements that included the statement: "It will take a little time to set things in place but, it is our hope, that in the near future the company that now connects you to people around the world will be able to connect you to people around the corner."[148] Ameritech submitted an advertisement in which TCG referred to itself as "the *other* local phone company."[149] Ameritech also submitted US Signal promotional materials in which US Signal claims that it is "the first local telephone service competitor Ameritech has ever faced," offers "one stop shopping," and provides descriptions and rates for a full range of telephone services, including business and residential intraLATA services.[150] Ameritech asserts that, in an assessment of whether the local telecommunications market is becoming competitive, the market should be defined to include these and other CAPs, IXCs, cable companies, wireless carriers, and private networks, because they have

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[145] Letter from Richard J. Metzger, General Counsel, ALTS, to Regina M. Keeney, Chief, Common Carrier Bureau, FCC (Nov. 30, 1995) (ALTS Nov. 30, 1995 *Ex Parte*).

[146] CompTel Update Comments at 6.

[147] Ameritech Update Reply at 4-5.

[148] Chicago Sun Times, May 5, 1995, at 21, *quoted in* Ameritech July 18, 1995 *Ex Parte*; Grand Rapids Press, May 9, 1995, at D5, *quoted in* Ameritech July 18, 1995 *Ex Parte*.

[149] Letter from Cronan O'Connell, Director, Federal Relations, Ameritech to William F. Caton, Acting Secretary, FCC (June 16, 1995) (Ameritech June 16, 1995 *Ex Parte*) at Attach. 1 (emphasis in original).

[150] Ameritech July 18, 1995 *Ex Parte* at Attach.

substantial additional capacity and financial resources, and the Customers First Plan will enable them to enter the market at low cost within one year.

57. Ameritech identifies the following facts to demonstrate that it currently faces substantial competition in Illinois and Michigan.[151]

- Ameritech states that it exchanged 6,484,000 minutes of switched local exchange traffic with competitors pursuant to reciprocal compensation agreements in the Chicago and Grand Rapids LATAs in October 1995, and that 9,176,980 such minutes were exchanged in November 1995.[152] In addition, Ameritech has entered into local resale agreements with U.S. Network and MFS, under which those competitors will resell Ameritech's bundled local services in Illinois beginning February 1, 1996.[153]

- Ameritech also states that, as of January 15, 1996, 4,482 end-office integration trunks, and 722 direct inward dialing (DID) trunks, have been connected with local exchange competitors in Chicago.[154] Similarly, Ameritech's evidence indicates that 964 end-office integration trunks have been connected in Grand Rapids.

- As of October 1995, 59 NXX codes have been assigned to competitors in Chicago. Fifty-eight of these codes have been activated, and twenty-seven of the codes are being used to serve end users, with 630 Ameritech telephone numbers ported to competitors using interim number portability as of January 15, 1996. In Grand Rapids, 2,429 unbundled loops have been sold to US Signal (of which 14.5 percent are residential), and 16 NXX Codes are being used to serve end users, with a total of 5,854 telephone numbers ported to competitors as of January 15, 1996.[155] As of

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[151] *Id.* at 6-17; Ameritech October 2, 1995 *Ex Parte*; Letter from Fred Konrad, Director, Federal Relations, Ameritech, to Kathleen M.H. Wallman, Chief, Common Carrier Bureau, FCC (October 4, 1995) (Ameritech Oct. 4, 1995 *Ex Parte*).

[152] Ameritech Jan. 17, 1996 *Ex Parte*. According to Ameritech, these numbers refer to the total number of minutes terminated on both companies' networks.

[153] *Id.*; Ameritech, *Ameritech Local Services Available for Resale* (Press Release), PR Newswire, Jan. 29, 1996.

[154] Ameritech Jan. 17, 1996 *Ex Parte*. End office integration trunks are trunks on which traffic can be measured for calculating reciprocal compensation. These trunks allow Ameritech to interconnect with competing local service providers in a manner similar to way Ameritech today interconnects with independent LECs.

[155] Ameritech October 2, 1995 *Ex Parte*; Ameritech Oct. 4, 1995 *Ex Parte*.

February 5, 1996, local service competitors have placed disconnect orders on behalf of end users of 1,578 lines in Chicago and 6,809 lines in Grand Rapids.[156]

- CAPs are providing 41 percent of the DS1-equivalent special access lines used by end users in downtown Chicago, and 48 percent of such lines in Grand Rapids.[157] Ameritech also has submitted evidence indicating that it served just under 53 percent of the market for high capacity services in Chicago as of April 14, 1995.[158]

- The price of Ameritech's interstate DS1 access service has fallen by 39 percent in Illinois since 1991, and Ameritech's switched interstate access rates in Illinois have fallen by 12 percent over the same time period.[159]

58. The IXCs and CAPs emphatically disagree with Ameritech's portrayal of competitive local exchange markets, arguing that Ameritech does not face any significant competitors that could constrain its conduct in markets for local exchange and switched access services. In particular, they contend that Ameritech receives 98 to 99 percent of their access payments in Illinois, and only slightly lower percentages in the Chicago and Grand Rapids LATAs.[160] In addition, they argue that CAPs do not have the capacity to compete effectively for most of Ameritech's business, submitting evidence that the CAPs (a) only serve about 285 buildings in Illinois,[161] (b) provide only 5.5 percent of the DS1 and 4.1 percent of the DS3 circuits terminating at AT&T points of presence in Chicago (and even less in Detroit and Grand Rapids),[162] and (c) generally do not have the equipment, "back office capacity" or capital necessary to assume a substantial amount of Ameritech's traffic.[163]

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[156] Ameritech Feb. 5, 1996 *Ex parte*. Because some customers switching to competing local service providers may place disconnect orders themselves, rather than relying on the new service provider to do so, these numbers may underestimate the quantity of Ameritech lines switched to competitors.

[157] Ameritech Update Reply at 4-5.

[158] Ameritech Jan. 17, 1996 *Ex Parte*.

[159] *Id.*

[160] Allnet Update Comments at 3; AT&T Update Comments at Attachment A, at 5; MCI Update Comments at 11, 19; Sprint Update Comments at 6.

[161] AT&T Update Comments at 12.

[162] *Id.* at 13.

[163] Sprint Update Comments at 7-11; AT&T Update Comments at 17 (Ameritech has 500 switches serving Illinois and 700 switches serving Michigan, but AT&T only has 30 switches in the entire Ameritech region).

59. Thus, many commenters (particularly the IXCs and CAPs) claim that in no part of its region, not even in the Chicago or Grand Rapids LATAs, does Ameritech face anywhere near the level of competition that the Commission found sufficient to justify waivers in the *NYNEX USPP Order*.[164] These commenters assert that an overwhelming number of customers who live or work in most of the LATAs within Illinois and Michigan cannot choose an alternative provider, even for special access services.

60. Some parties argue that if any relief is granted, it should be limited to the Chicago and Grand Rapids LATAs.[165] MCI and MFS argue that if any waivers are granted, they must be narrowly tailored to protect the development of competition,[166] and Sprint contends that any relief should be limited to high capacity special access services provided in Chicago and Grand Rapids.[167] The Michigan Commission argues that granting waivers only where the DOJ trial is underway ensures that the necessary nexus is maintained between the existence of real competitive alternatives and a reduction in regulatory oversight.[168] The Ohio Consumers Counsel agrees that any waivers must be limited to markets that have actual, measurable competition.[169] By contrast, Ameritech focuses on contestability, and contends that the waivers should be granted for the entire states of Illinois and Michigan in light of the measures taken in those states to remove barriers to entry.[170]

2. Discussion

61. *Overview.* Based on the evidence before us, we conclude that Ameritech has demonstrated the necessary special circumstances to justify a limited waiver of our access charge rules in those portions of the Chicago and Grand Rapids LATAs located within Illinois and Michigan.[171] In reviewing requests by LECs to restructure their interstate access

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[164] *See, e.g.*, Allnet Update Comments at 13; ALTS Update Comments at 6-8; AT&T Update Comments at 18-19; MCI Update Comments at 12-13; MFS Update Comments at 3-6.

[165] GSA Update Comments at 6-7.

[166] MCI Update Comments at 22; MFS Update Comments at 4.

[167] Sprint Update Comments at 15.

[168] *Id.*

[169] Ohio Consumers Counsel Comments at 46-48.

[170] Ameritech Update Reply at 4-7.

[171] Throughout this order, we use the phrases "the Chicago and Grand Rapids LATAs" or "the waiver territories" to refer to those portions of the LATAs that fall within Illinois and Michigan, because the intrastate regulatory reforms described herein are effective only in the territories of those two states.

charges, we acknowledge that the existing access charge rate structure was developed in a monopoly environment. Economic, technological, and legal conditions have changed since the existing rate structure was developed, and we are committed to reexamining our rules in the near future. In this waiver proceeding, however, we do not examine the validity of the underlying rules from which Ameritech seeks waivers. Instead, we confine ourselves to deciding whether, under the special circumstances presented by Ameritech, continued application of those rules in certain portions of the Ameritech region would serve the public interest.

62. Ameritech, in concert with the Illinois and Michigan commissions, has taken steps to remove the most significant barriers to competitive entry in exchange and access markets, and the Illinois and Michigan commissions are actively working to resolve the remaining issues involving possible barriers to such competition. The evidence also indicates that competitive carriers with substantial capacity and a track record of successful competition in other markets have begun to interconnect with Ameritech's local network within the Chicago and Grand Rapids LATAs, and to offer competing exchange and access services. As a result, Ameritech's interstate access customers in those areas are likely to have alternative sources of supply for local loop and switching services. In order to avoid paying the non-cost-based elements of Ameritech's carrier common line and transport interconnection charges, these IXCs will have incentives unrelated to economic efficiency to seek such alternatives, or to influence end users to do so.

63. Although we cannot predict the exact manner in which competitive markets will develop, we believe that the disparities between costs and prices created by our access charge rules create substantial incentives for uneconomic bypass in markets exposed to competitive entry.[172] As discussed below, when such uneconomic bypass can occur on a

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[172] *See infra* para. 101. Some have predicted that end users, rather than IXCs, are likely to control the choice of access provider in competitive local markets, and thus argue that distortions in LEC per-minute switched access rates charged to IXCs would not cause traffic to be shifted to competing local service providers. *See, e.g.*, Joseph Gillan & Peter Rohrbach, *The Potential Impact of Local Competition on Telecommunications Market Structure: Diversity or Reconcentration?* (March 1994). While this may be the case in some circumstances, we believe that the risks of inefficient entry and competitive distortions are sufficiently great to warrant the relief that we grant here. Even if end users effectively select the access provider when they choose their local telephone company, IXCs are likely to take steps to influence that choice since access costs constitute a substantial portion of long distance costs. An IXC could, for instance, restructure rates to pass on at least some of the access cost savings to end users that switch to alternative local service providers, or offer targeted promotional packages to achieve this goal. IXCs may also develop different strategies in different areas or in different market segments. In addition, as competition develops, access and interexchange services may be provided by carriers that have developed business relationships with each other (such as that between TCG and Sprint), or by vertically integrated carriers (such as MCI with its affiliate MCI Metro, and Ameritech with its interexchange affiliate). In those scenarios, competitors will be able to take more direct advantage of any uneconomic incentives in LEC access rates. The extent to which those scenarios will develop in the Ameritech
(continued...)

large scale, it may encourage potentially inefficient entry seeking to take advantage of the pricing distortions resulting from our access charge rules. These conditions constitute special circumstances that support waivers of our rules regarding Ameritech's recovery of the carrier common line and transport interconnection charges in the Chicago and Grand Rapids LATAs. Ameritech has not, however, demonstrated the necessary special circumstances outside of those LATAs.

64. Our conclusion that Ameritech has demonstrated special circumstances justifying the specific waivers discussed below relating to the carrier common line and transport interconnection charges does not necessarily mean that the same circumstances justify any other relief. In particular, we reach no conclusion regarding the other waivers Ameritech proposed in connection with the Customers First Plan, including waivers to remove transport, switching, and interexchange services from price caps, to apply zone density pricing to those services, and to permit rate changes for these services with no cost support on one day's notice. We intend to address those proposals in a subsequent order. We also emphasize that nothing in this order should be taken as a determination that Ameritech has satisfied any of the requirements of the Telecommunications Act of 1996. Specifically, we reach no conclusion as to whether Ameritech has or has not met the conditions for in-region interLATA entry set forth in Section 271 of the Act.[173]

a. Removal of Barriers to Entry

65. We previously have modified our rules to remove barriers to the competitive provision of certain interstate access services, and to foster the development of access competition. In particular, our decisions in the *Expanded Interconnection* proceeding facilitate the competitive provision of interstate special access service and the transport component of interstate switched access service.[174] Nevertheless, in most parts of the

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[172](...continued)
region or elsewhere is unclear, and it is likely that both IXCs and local service providers without partners or affiliates in other markets will continue to thrive as local markets become more competitive. We need not, however, determine the exact means or full extent to which IXCs or end users will bypass LEC facilities before we act.

[173] Telecommunications Act of 1996 at § 271.

[174] *See Special Access Expanded Interconnection Order*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd at 7452 ¶ 174 n.403 (1992); *Expanded Interconnection with Local Tel. Co. Facilities*, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374, 7426-29 ¶¶ 98-104 (1993) (*Transport Expanded Interconnection Order*); *Expanded Interconnection with Local Tel. Co. Facilities, Transport Phase II*, Third Report and Order, 9 FCC Rcd 2718 (1994) (*Third Report and Order*); *Expanded Interconnection with Local Tel. Co. Facilities*, Memorandum Opinion and Order, 9 FCC Rcd 5154, 5196-97 ¶¶ 153-56 (1994) (*Virtual Collocation Order*).

country, entry barriers continue to hamper the development of competition for other components of interstate switched access service, particularly the local switching and common line elements. In some states, statutes or regulations have prohibited parties other than the franchised monopoly LECs from providing switched local exchange service. Because customers use the same local switching and loop facilities for local exchange calling and interstate calling, it is also difficult for competitors to provide the local switching and local loop components of interstate switched access service unless competition for local exchange service is also possible. In most other states, it is difficult for local exchange competition to emerge even in the absence of legal prohibitions because there are no arrangements in place governing the technical and financial aspects of interconnection between competing local networks.

66. Typically, there are also substantial technical and economic barriers to entry in local exchange markets. Most LECs offer local exchange service as a bundled package, rather than offering local loops and local switching on an unbundled basis. Unbundling these services would reduce the investment needed for new competitors to enter the local exchange market by enabling them to combine their own facilities with resold LEC facilities to provide service. Because of these and other regulatory, technical, and economic factors, LECs in most parts of the country continue to exercise market power in the provision of both intrastate local exchange service and the local switching and common line components of interstate switched access service.

67. *Removal of Barriers in Illinois*. Unlike much of the country, the most significant barriers to entry for local exchange service have been removed in Illinois, which makes possible competition for all components of interstate switched access service as well. The Illinois legislature removed its statutory prohibition against the competitive provision of local exchange service in 1988,[175] and at least seven competitive local exchange service providers have been certified by the Illinois Commission. As part of its Customers First Plan, Ameritech proposed, *inter alia*, the following: (1) to offer local loops, local switching, SS7, and other services on an unbundled basis; (2) to establish interconnection and joint traffic arrangements with competing local carriers, including mutual compensation for the termination of local traffic; (3) to offer competing providers of local switched service functions such as 911, directory assistance, and operator services; and (4) to divest its responsibilities as central office code administrator and to cooperate in developing number portability solutions.[176] The Illinois Commerce Commission accepted those proposals, and in a number of instances, directed Ameritech to go further in facilitating local exchange

[175] Universal Telephone Service Protection Law of 1985, Ill. Ann. St. ch. 220 ¶ 5/13-405 (1995).

[176] Petition at 13-14; Update at 5-6, Ameritech Update Reply at 10-11.

competition than Ameritech had proposed.[177] Ameritech has now established unbundled loop charges and reciprocal compensation rates in Illinois.[178]

68. We recognize that many issues relating to local exchange competition remain unresolved before the Illinois Commission. Competing local service providers have challenged the interconnection tariff, arguing that it is anticompetitive and inconsistent with the commission's orders, and the Illinois Commission has initiated an investigation of those tariffs.[179] The Illinois Commission also has initiated rulemaking and other proceedings to address universal service, number portability, and other matters relating to local exchange competition.[180] As discussed below, however, competitive entry is occurring in the Chicago LATA, indicating that entrants have concluded that changes they have seen and expect to see provide a meaningful opportunity for entry. Every step in this implementation process need not have been completed before we conclude that Ameritech and the Illinois Commission have removed the most significant barriers to entry.

69. *Removal of Barriers in Michigan.* Significant barriers to entry in local telecommunications markets have also been removed in Michigan. The Michigan legislature removed that state's statutory prohibition against the competitive provision of local exchange service in 1991, and took additional steps intended to further competition in 1995.[181] As discussed above, the Michigan Public Service Commission has ordered Ameritech to interconnect with US Signal's network and has specified certain interim interconnection

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[177] *See supra* paras. 21-22.

[178] Ameritech's monthly unbundled loop rates in Chicago (zone 1) are $7.49 for business and $4.80 for residential lines, compared to $22.85 (including the federal subscriber line charge) for both types of lines provided by NYNEX in New York at the time of the *NYNEX USPP Order*. Ameritech Oct. 4, 1995 *Ex Parte* at App. 1. The Illinois Commission mandated that Ameritech's reciprocal compensation rate be set at $0.0075 per-minute for tandem-routed traffic and $0.005 per minute for direct-routed traffic; the comparable rate in New York is approximately $0.014 per minute. Although Ameritech's interconnection tariff is in effect in Illinois, the Illinois Commissions has an ongoing tariff investigation.

[179] *Illinois Comm. Comm'n v. Illinois Bell Tel. Co. (Citation to Investigate Illinois Bell Tel. Co.'s Rates, Rules, and Regulations for its Unbundled Network Component Elements, Local Transport Facilities, and End Office Integration Services)*, Citation Order, Dkt. No. 95-0296 (Ill. Comm. Comm'n June 21, 1995); *Application of City Signal, Inc. for an Order Establishing and Approving Interconnection Arrangements with Mich. Bell Tel. Co.*, MPSC Staff's Request for Clarification, Case No. U-10647 (Mich. Pub. Serv. Comm'n July 24, 1995) (attached to Letter from Martin W. Clift, Jr., Director, Regulatory Affairs, US Signal Corp., to William F. Caton, Acting Secretary, FCC (July 26, 1995)).

[180] *See supra* paras. 20-21.

[181] Mich. Telecom. Act. sec. 302(1), Mich. Comp. Laws § 484.2103 (1995); 1995 Mich. Legis. Serv. P.A. 216 (S.B. 722) (West).

requirements.[182] Pursuant to orders by the Michigan Commission, Ameritech has also filed a tariff permitting the purchase of unbundled loops and switching facilities at prices determined by total service long run incremental costs and ordered Ameritech to offer interim number portability at a "transitional price" based on incremental costs. Ameritech is now offering unbundled loops at relatively low tariffed rates mandated by the Michigan Commission.[183] The Michigan Telecommunications Act of 1995 further clarified the framework for exchange and access competition in Michigan.[184]

70. As is the case in Illinois, significant issues concerning barriers to entry also remain unresolved in Michigan. The Michigan Commission has initiated generic dockets to develop long-term interconnection rules to replace the interim measures in place today. Nonetheless, competitive entry is occurring in Grand Rapids,[185] indicating that entrants have concluded that changes they have seen, and expect to see, in Grand Rapids provide a meaningful opportunity for entry. Therefore, based on the evidence before us, we conclude that significant barriers to entry been removed in the Grand Rapids LATA even though some issues remain unresolved.

71. In sum, the Illinois and Michigan commission orders have established interim frameworks under which competition can develop in local telecommunications markets in those states. The presence of effective tariffs means that competitors can take advantage of those frameworks. We emphasize that our conclusion here regarding Ameritech's interconnection tariffs in Illinois and Michigan is limited to a finding that Ameritech has shown special circumstances that justify a waiver in certain parts of those states. We do not address more generally whether steps such as those that the Illinois and Michigan commissions are taking in rulemaking or tariff review proceedings would justify any other policy changes, nor do we consider the sufficiency of local interconnection tariffs Ameritech has filed, or that it or other LECs might file in other states.

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[182] *See supra* paras. 23-24.

[183] Ameritech's monthly unbundled loop rates in Michigan are $8.00 for business lines and $11.00 for residential lines, compared to NYNEX's rate of $22.85 (including the federal subscriber line charge) for both business and residential lines in New York at the time of the *NYNEX USPP Order*. Ameritech Oct. 4, 1995 *Ex Parte* at App. 1. We acknowledge that there may be differences in retail rates between Michigan and New York that make this comparison less meaningful.

[184] 1995 Mich. Legis. Serv. P.A. 216 (S.B. 722) (West).

[185] *See infra* paras. 78-79.

b. Emergence of Competition

72. The removal of barriers to entry, by itself, would not be sufficient to provide the requisite special circumstances justifying the waivers sought by Ameritech. The development of the facilities necessary to provide competitive exchange and access services requires significant investment, which makes it unlikely that Ameritech would be exposed to a serious threat of uneconomic bypass that would justify a waiver of our rules until some actual competition has emerged. It would be imprudent for us to conclude that a meaningful opportunity exists to enter and challenge Ameritech effectively for the right to serve potential customers without a demonstration that at least some actual competition is beginning to develop. Moreover, we do not accept Ameritech's contention that the requested waivers are justified solely on the basis of market contestability.[186]

73. On the other hand, it is not necessary to conclude that fully effective competition has developed in the interstate access and local exchange markets to establish that special circumstances exist that justify the limited waiver described below. Under the increasingly competitive environment in certain of Ameritech's service areas, the existing access charge rules create incentives for switching to alternative providers for reasons unrelated to the relative economic merits of competing providers. In an environment where competition has begun to emerge, those incentives could encourage inefficient entry in markets for services where access charges artificially inflate prices and could prevent end users from receiving the full benefits of competition.[187]

74. *Emergence of Competition in the Chicago LATA.* The record evidence demonstrates that seven potential competitors have received certification as providers of local exchange service in the Chicago LATA. It appears that competitors are originating significant and rapidly increasing amounts of local exchange traffic, as demonstrated by the millions of minutes of traffic exchanged pursuant to reciprocal compensation agreements. In addition, Ameritech has presented evidence that AT&T and other large potential competitors

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[186] We note that Ameritech's use of the term "contestability" appears to refer to the theory of contestable markets. *See, e.g.*, William J. Baumol, John C. Panzar & Robert D. Willig, *Contestable Markets and the Theory of Industry Structure* (1982). In general, the theory of contestable markets suggests that where competitors can enter and exit a single-provider market quickly, easily, and without incurring substantial sunk costs or costs not borne by the incumbent firm, the threat of entry will constrain the incumbent's ability to exercise market power. As a result, it is postulated that where the specified conditions apply, even if there is only a sole provider, it is possible to obtain market performance approaching that which would be observed if competition were possible within the market. Here, however, the conditions appear not to apply: entry and exit are neither low-cost nor rapid. In addition, the extent to which contestable markets exist in the real world has been challenged by other economists. *See, e.g.*, William G. Shepherd, *"Contestability" vs. Competition*, 74 American Economic Review 572 (1994).

[187] These problems are described in greater detail below. *See infra* para. 101.

have targeted the Chicago and Grand Rapids areas for large-scale entry into the local exchange market in the near future.[188]

75. Certified competitive local exchange providers have established networks in the Chicago area that provide them with the capability of entering the market for local exchange service without substantial delay. Ameritech has presented evidence that competitors are currently in business within the Illinois portion of the Chicago LATA and have the network capacity to provide a substantial portion of the exchange and access services currently provided by Ameritech. Competitive providers of local exchange service have six switches in place in the Chicago LATA, and AT&T has announced plans to install an additional three switches in the area.[189] The record contains evidence indicating that MFS's network covers a total of 124 miles in the Chicago area, serving 134 buildings, and TCG's network covers 280 miles, serving 114 buildings in the area.[190]

76. Ameritech also submitted evidence demonstrating that it exchanged 6,484,000 minutes of local exchange traffic with competitors in the Chicago and Grand Rapids LATAs pursuant to reciprocal compensation agreements in October 1995, and that 9,176,980 such minutes were exchanged in November 1995.[191] Although, for customer confidentiality and other reasons, Ameritech has not disclosed the percentage of those minutes attributable to each of the two LATAs,[192] it is clear that at least some interconnection is occurring in both places. It is also reasonable to conclude based on the numbers of interconnected facilities that a substantial majority of that traffic is being exchanged in Chicago. The pace at which the total number of minutes is increasing is also evidence of burgeoning competitive entry. In addition, it appears that competitors have activated 59 NXX codes in Chicago, which provide them with approximately 590,000 potential phone numbers.[193] In addition, the evidence indicates that Ameritech has ported 630 numbers to competitors in Chicago as of

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[188] Ameritech July 18, 1995 *Ex Parte*.

[189] This compares favorably with the situation in New York City when we decided the *NYNEX USPP Order*, where competitors had a total of four switches in place. *NYNEX USPP Order*, 10 FCC Rcd at 7458-59, ¶ 34.

[190] These figures are also comparable to the evidence presented in the *NYNEX USPP Order*, which indicated that MFS's network covered 64.6 miles, serving 283 buildings, and TCG's network covered 325 miles, serving nearly 300 buildings. *Id.*

[191] Ameritech Jan. 17, 1996 *Ex Parte*.

[192] Among other things, Ameritech would risk exposing competitors' confidential business information if it were to provide the actual apportionment of reciprocal compensation minutes between Chicago and Grand Rapids.

[193] Ameritech Jan. 17, 1996 *Ex Parte*.

January 15, 1996.[194] Ameritech has provided evidence that, as of January 15, 1996, 4,482 end-office integration trunks, and 722 DID trunks have been connected with competitors in Chicago.[195] Overall, the evidence presented leads us to conclude that entry is occurring to such an extent that, if the Commission's current rules continue to apply, substantial uneconomic bypass could develop.

77. As many competitors argue, actual competition does in fact remain quite limited -- most customers in most of the Chicago LATA are still unable to choose the services of a competing provider of local exchange services. In addition, as of January 15, 1996, no unbundled loops had been sold in Chicago.[196] This does not, however, negate the showing of special circumstances in the LATA. The investment decisions of actual and potential entrants and their prospective customers are very likely to be affected by the opportunity to bypass the components of Ameritech's per-minute interstate switched access charges that are not related to the costs of providing those services. The evidence in the record demonstrates that competing local service providers in Chicago are interconnecting their facilities with Ameritech's local network. These arrangements provide the additional evidence necessary to demonstrate the likelihood that the components of Ameritech's access charges that are unrelated to the costs of providing the underlying services will cause distortions in the economic incentives of entrants and customers. The fact that, in contrast to Grand Rapids, competitors in Chicago have not yet purchased unbundled loops, is not fatal to our finding. Competitors to incumbent LECs may pursue different strategies for developing a market presence, including resale of bundled LEC facilities, use of unbundled loops, and total bypass of LEC facilities. In a densely populated urban area such as Chicago, where major CAPs have been established for some time, competitors may initially focus their efforts on areas where they already have facilities in place to reach customer premises without relying on resold LEC facilities. The substantial number of end office integration and DID trunks in place, and the substantial and growing number of reciprocal compensation minutes, suggest that competitive entry is beginning in Chicago, and that the absence of purchased unbundled loops may not accurately reflect the state of competition in that LATA. As a result, we conclude that the earlier monopoly environment has eroded to a sufficient degree to justify granting the limited waivers of the Commission's access charge rules described below.

78. *Emergence of Competition in the Grand Rapids LATA.* In Grand Rapids, US Signal has already entered the local exchange market, and expects to obtain a substantial share of the exchange and access market in that area once it resolves the terms of

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[194] *Id.*

[195] *Id.*

[196] *Id.*

interconnection with Ameritech.[197] The evidence presented by Ameritech concerning Grand Rapids is consistent with the evidence presented by NYNEX that led us to issue the *NYNEX USPP Order*. US Signal has a switch in place in the Grand Rapids LATA that should permit it to handle a substantial amount of the LATA's switched traffic. US Signal's network covers 220 miles and serves 250 buildings in the area.[198]

79. As discussed above, Ameritech has submitted evidence that appears to demonstrate that it is exchanging a substantial and increasing amount of local exchange traffic with competitors in Grand Rapids LATAs pursuant to reciprocal compensation agreements.[199] In many other respects, the evidence before us concerning actual competition in the Grand Rapids LATA is comparable to that presented for the Chicago LATA. It appears that competitors have activated 16 NXX codes in Grand Rapids, which provide them with approximately 160,000 possible phone numbers.[200] In addition, the evidence indicates that Ameritech has ported 5,854 numbers to competitors in Grand Rapids as of January 15, 1996.[201] The evidence indicates that US Signal had purchased 2,429 unbundled loops from Ameritech as of January 15, 1996.[202] Similarly, Ameritech's evidence indicates that 964 end-office integration trunks have been connected in Grand Rapids, and US Signal has implemented interconnection arrangements in four central offices in Grand Rapids.[203]

80. As with Chicago, competition clearly remains limited in Grand Rapids. The early stage of competitive development, however, does not negate the showing of special circumstances in the LATA. Once again, the evidence indicates that competing local service providers are interconnecting their facilities with Ameritech's local network, and that the investment decisions of actual and potential entrants and their prospective customers are very likely to be affected by the manner in which our access charge structure modifies economic incentives by distorting the relationship between costs and prices. As a result, we conclude competition has emerged in Grand Rapids to the point that where our access charge structure may interfere with the efficient operation of an emerging competitive market. This could prevent end users from receiving the full benefits of competition and, therefore, we conclude

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[197] US Signal July 26, 1995 *Ex Parte*.

[198] *Id.*

[199] Ameritech Jan. 17, 1996 *Ex Parte*.

[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] *Id.*

that Ameritech has met its burden of demonstrating that special circumstances justify the waivers described herein in the Grand Rapids LATA.

81. *Related Matters.* We conclude that LATAs are appropriate boundaries for the waivers we grant today. Limiting relief to geographic areas smaller than LATAs would not be in the public interest because it would result in greater administrative costs and complexity than would be justified by the benefits provided by more narrowly defining the waiver territories. Conversely, the evidence presented by Ameritech in this proceeding does not justify expansion of the relief beyond the two LATAs. Ameritech requests waivers for the entire states of Illinois and Michigan, arguing that because the state commissions have eliminated barriers throughout those states, access services are contestable statewide.[204] Ameritech has been unable, however, to show that a measurable competition for exchange and switched access services is emerging anywhere in Illinois or Michigan outside the Chicago and Grand Rapids LATAs. Specifically, the record evidence does not indicate that competitors with sufficient capacity to divert significant business from Ameritech have interconnected with it and are competing to provide intrastate exchange and switched access services outside of those LATAs. Therefore, it does not appear that competition has begun to emerge in the remainder of Illinois and Michigan. As in the *NYNEX USPP Order*, the adverse public interest consequences that could result if customers move traffic from Ameritech's network to competitive providers' networks in response to the distorted incentives created by our access charge rules are likely to happen more quickly and to have a greater impact in those LATAs than elsewhere.

82. We also disagree with certain parties' arguments that no waiver should be granted to Ameritech because it has failed to demonstrate that exchange and access competition has developed, even in Chicago and Grand Rapids, to the extent shown by NYNEX in the *NYNEX USPP Order*. The evidence concerning the removal of barriers to entry and the emergence of competition in the two LATAs is generally comparable to that presented by NYNEX, and the evidence supports the conclusion that competitive activity in Chicago and Grand Rapids is likely to increase significantly in the near future. In short, we conclude that the record evidence in this case shows that new entrants have a realistic opportunity to compete in the Chicago and Grand Rapids exchange and switched access markets, and that several such firms have begun to compete directly with Ameritech in those LATAs. In these circumstances, the continued application of all of our current access charge rules would create a serious risk of significant uneconomic bypass. Accordingly, we believe that the public interest will be better served by granting Ameritech waivers in those areas than by applying the existing rules. In addition, our decision in the *NYNEX USPP Order*, while providing useful guidance on the factors to consider in evaluating similar proposals, should not be taken as defining an absolute minimum degree of competition that must be

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[204] Update at 16.

demonstrated to justify a waiver. Our inquiry in waiver proceedings must necessarily proceed on a case-by-case basis.

C. Public Interest Analysis of the Bulk Billing Proposal

1. Positions of the Parties

a. General Comments

83. Ameritech claims in its Petition that bulk billing advances three goals: recovering subsidies and regulatory-related costs in a competitively neutral manner; eliminating price dislocations and distortions; and adjusting rates for competitive services to competitive levels.[205] Ameritech states that the CCL charge and TIC currently recover costs not related to the provision of switched access, but in effect, function as a surcharge on local switching rates.[206] According to Ameritech, this misallocation of costs keeps Ameritech's access rates artificially high compared to local access competitors. Thus, under the current system, competitors may be able to price their access services below Ameritech's rates even if Ameritech is the most efficient carrier. Such inefficient entry could lead to wasteful investment and could harm consumers. To bolster its argument, Ameritech notes that in the *NYNEX USPP Order*, the Commission found that the CCL charge and the TIC artificially create incentives for IXCs to seek alternative sources of supply for interstate switched access.[207]

84. Some end-user groups, the Information Technology Association of America (ITAA), and the BOCs offer general support for Ameritech's bulk billing proposal as a way to reduce inefficiencies in the current access rate structure, but encourage the Commission to examine access charge reform more broadly.[208] AARP generally supports the bulk billing proposal as a means to reform access charges without raising local residential rates.[209] The

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[205] Petition at A-12.

[206] Ameritech Update Reply at 18.

[207] *Id.* at 18-20 (citing *NYNEX USPP Order*, 10 FCC Rcd at 7456 ¶ 28).

[208] ITAA Comments at 9-10; Pacific Bell Comments at 20-24, 28; NYNEX Comments at 27-28; Bell Atlantic Comments at 4.

[209] AARP Comments at 20; *see also* AARP Reply at 13 & n.2.

General Services Administration commends Ameritech for "fleshing out" a proposal that could serve as an effective interim means of funding public policy subsidies.[210]

85. A number of commenters challenge Ameritech's assessment of the level of misallocated costs in existing access rates. MCI, ALTS, Time Warner, and Cox assert that Ameritech has not offered sufficient information in support of its proposal and its characterization of certain costs as "subsidies," and that Ameritech should be required to provide additional data, such as the underlying costs of its local transport and local loops.[211] State commission commenters and the Ohio Consumers' Counsel similarly press for additional information about Ameritech's method for determining what Ameritech considers to be regulatorily-imposed surcharges on its local switching.[212]

86. Potential local exchange competitors to Ameritech claim that bulk billing, rather than redressing inefficiencies in the current access charge system, would only guarantee Ameritech's monopoly revenue stream and shift Ameritech's costs to its competitors.[213] TCG asserts that bulk billing would preserve Ameritech's "monopoly claim" on subsidy revenues even when customers bypass elements of Ameritech's network, and thereby give Ameritech a competitive advantage.[214] According to Sprint, Ameritech's plan fails to address the need to reduce and narrowly target subsidies in existing access rates and does not address intrastate subsidies.[215] Sprint and Time Warner state that bulk billing would remove incentives for Ameritech to increase its productivity, and claim that, to the extent that the CCL charge and TIC recover excess costs incurred under rate of return regulation or

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[210] General Services Administration Update Comments at 7-8; General Services Administration Reply at 15-16. Although the General Services Administration generally supports the use of bulk billing, it opposes the inclusion of the TIC in the charges to be bulk billed, because it contends that the TIC recovers costs that should be the responsibility of Ameritech.

[211] MCI Update Comments at 18; MCI Reply at 20-21; ALTS Comments at 11; Cox Reply at 17; Time Warner Update Comments at 5-6, 11-13.

[212] Illinois Commerce Commission Comments at 9; Ohio Consumers' Counsel Comments at 37.

[213] LDDS Update Comments at 18; Cox Reply at 17; TCG Update Comments at 7-8; Allnet Update Comments at 14.

[214] TCG Update Comments at 7-8.

[215] Sprint Comments at 16; Sprint Update Comments at 19. The Information Technology Association of America, although generally supporting Ameritech's proposal, makes similar arguments that Ameritech fails to address the full extent of subsidies embedded in existing access and local switching rates. ITAA Comments at 10-11.

obsolete plant and equipment, Ameritech should write off those costs.[216] Similarly, MCI and MFS argue that competition should be permitted to drive out inefficiencies embedded in Ameritech's current rates, and that Ameritech will have no incentive to operate efficiently if it is guaranteed recovery of costs through a bulk billing mechanism.[217]

87. Ameritech responds that bulk billing would not place competitors at a disadvantage. According to Ameritech, bulk-billed costs would be recovered in a manner that neither encourages nor discourages the purchase of Ameritech or any other carriers' access services.[218] Ameritech acknowledges that bulk billing does not represent a long-term solution to the industry-wide problem of subsidy recovery. Rather, Ameritech advocates bulk billing as an interim response that addresses the threat of inefficient entry while not disturbing existing subsidy flows.[219]

88. Small LECs contend that Ameritech's bulk billing proposal is poorly thought-out, and could undermine the system for ensuring universal service.[220] OPASTCO and Staurulakis also express concern that the Customers First Plan would result in geographic deaveraging of toll rates, which would increase rates in rural areas.[221] Nevertheless, OPASTCO acknowledges that bulk billing might be appropriate for adapting universal service mechanisms to a competitive market, so long as the Commission reviews the proposal in a comprehensive rulemaking.[222] Staurulakis asserts that bulk billing might provide Ameritech with an unfair advantage over carriers whose rates reflect high cost program funding requirements, and thereby create an incentive for customers to bring business to the Ameritech region and to avoid other service areas.[223]

89. Ameritech asserts in response that its bulk billing plan will preserve and strengthen universal service in a competitive environment, and will not affect independent

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[216] Sprint Update Comments at 17-19; Time Warner Update Comments at 15.

[217] MFS Update Comments at 6; MCI Comments at 43; MCI Update Comments at 17-18.

[218] Ameritech Update at 15.

[219] *Id.*

[220] OPASTCO Comments at 5-6.

[221] *Id.* at 6; Staurulakis Comments at 5-6. OPASTCO and Staurulakis argue that the possibility of geographic deaveraging of toll rates demonstrates that the effects of the Customers First Plan will be nationwide in scope, and that a rulemaking proceeding is therefore necessary to consider the Plan. *Id.*

[222] OPASTCO Comments at 6 n.7.

[223] Staurulakis Comments at 4.

telephone companies.[224] Ameritech explains that the Plan does not interfere with the current Universal Service Fund and Lifeline Assistance charges, which NECA bills directly to IXCs.[225] According to Ameritech, the current access rate system would eventually lead IXCs to reduce the volume of traffic using Ameritech's switching in order to avoid paying for public policy subsidies, leading to a "spiral" which would ultimately destroy the funding base for those subsidies.[226]

90. Several IXCs and the Indiana Utility Consumer Counselor raise questions about the mechanics of the proposed bulk billing mechanism. Sprint and Allnet suggest that the billing agent hired by Ameritech to administer the bulk billing system might not be impartial.[227] Sprint claims that IXCs will be required to establish billing and audit mechanisms to handle the new bulk billing mechanism, and that the process of tracking access payments will become increasingly complex as more LEC-specific access rate structures are permitted.[228] MCI asserts that Ameritech's proposal to use minutes of use as the basis of calculating market share conflicts with the method the Commission allowed in the *NYNEX USPP Order*.[229] The Indiana Utility Consumer Counselor argues that Ameritech's proposal to base apportionment on market share would benefit Ameritech if and when Ameritech enters the interLATA market, because the annual assessment of market share would lag behind the actual state of the market and would undercharge IXCs with a growing market share, such as Ameritech's interexchange affiliate.[230]

91. Ameritech replies that its proposal would distribute the burden of costs on IXCs in roughly the same allocation as it exists today, and new IXCs will pay their fair share of costs as they enter the business.[231] In response to commenters who attack the mechanics of the bulk billing process, Ameritech asserts that a system based on market share would be more consistent with the existing burden on IXCs than a mechanism based on presubscribed

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[224] Ameritech Reply at 25-27.

[225] *Id.* at 26.

[226] *Id.* at 27.

[227] Sprint Update Comments at 20 & n.12; Allnet Update Comments at 14 & n.21.

[228] Sprint Update Comments at 20 & n.12.

[229] MCI Update Comments at 21.

[230] Indiana Utility Consumer Counselor Comments at 32-33.

[231] Ameritech Update Reply at 17.

lines.[232] Ameritech states that it will hire an independent billing agent to administer the bulk billing system and collect market share information from carriers, in order to avoid the need for disclosure of competitively sensitive data.

b. Carrier Common Line Charge

92. *Long Term Support*. Commenters acknowledge that NECA long-term support payments represent true subsidies, and generally do not object to Ameritech's proposal to recover them through a bulk billing mechanism. Both AT&T and CompTel, although expressing opposition to most of Ameritech's proposal, specifically acknowledge that LTS payments are subsidies that are appropriately addressed through a bulk billing mechanism.[233] AT&T draws an analogy between Ameritech's proposal to bulk bill LTS costs and the existing mechanism used to recover interstate telecommunications relay service costs.[234] The General Services Administration argues that an increase in the SLC would be the preferred long-term means of recovering subsidies for residents of high cost areas.[235]

93. *Common Line Recovery*. Potential local service competitors to Ameritech argue that the Ameritech's proposal to bulk bill CCL common line revenues would harm competition. AT&T and Cox claim that Ameritech's own end-user customers would pay only a portion of Ameritech's loop costs, whereas competitors would have to pay all of their own costs plus a portion of Ameritech's costs.[236] According to AT&T, the result would be to "virtually preclude competitive opportunities for a number of exchange functions,"[237] because competitors would be unable to undercut Ameritech's artificially-depressed local rates. US Signal explains that its interstate access tariff does not distinguish between subscriber loop facilities it owns and facilities it leases from Ameritech for purposes of billing CCL charges to IXCs. US Signal argues that it is entitled to recover CCL charges when it provides access to IXCs, including situations where it uses unbundled loops purchased from Ameritech, and that as a result, IXCs will be billed for the same costs by

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[232] *Id.* at 17 & n.41.

[233] AT&T Comments at 2, 34; CompTel Update Comments at 13.

[234] AT&T Comments at 2, 34.

[235] General Services Administration Reply at 15-16.

[236] AT&T Comments at 30-31; AT&T Update Reply at 8-9; Cox Reply at 17.

[237] AT&T Comments at 30.

Ameritech and US Signal.[238] The American Petroleum Institute asserts that Ameritech's proposal would violate the Commission's 1986 *Guidelines Order*.[239]

94. In response to those who demand additional information about Ameritech's basis for assessing the level of charges to be bulk billed, Ameritech in three *ex parte* submissions provides a detailed breakdown of its average loop costs in each state of its region, and the level by which its interstate loop costs exceed the recovery permitted through the SLC.[240] Based on estimated 1995 demand, the CCL bulk billing amount would be $69.9 million in Illinois and $43.6 million in Michigan, and the bulk billed portion of the TIC would be $55.8 million in Illinois and $32.7 million in Michigan. Ameritech denies that bulk billing would guarantee Ameritech recovery of its costs. Ameritech explains that loop costs recovered through bulk billing would be capped at a putative cost per line which would be subject to the current price cap index, and, under Ameritech's modified price cap proposal, would be subject to a supplemental cap at its current level for three years.[241]

95. Two methods for recovering loop costs other than bulk billing are discussed in the record. In its original Petition, Ameritech raises the possibility that, as an alternative to bulk billing, misallocated costs in existing access rates could be "allocated back to the services to which they belong."[242] Ameritech includes similar language in the Update, and states that, although "allocating back" is more desirable from an economic perspective, bulk billing represents an interim solution that can be implemented quickly.[243] In its Update Reply, Ameritech clarifies that it believes that all loop costs ultimately should be recovered directly from end-users through the SLC.[244]

96. Commenters are split on the merits of this approach. AARP argues that increasing the SLC would upset the compromise reached between the FCC and state

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[238] US Signal Update Comments at 2.

[239] American Petroleum Institute Comments at 16-17 (citing *Petitions for Waiver of Various Sections of Part 69 of the Commission's Rules*, 104 FCC 2d 1132 (1986), *recon.*, 2 FCC Rcd 28 (1987)).

[240] Letter from Cronan O'Connell, Director, Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC (May 5, 1995) (Ameritech May 5, 1995 *Ex Parte*); Ameritech June 2, 1995 *Ex Parte*; Ameritech June 21, 1995 *Ex Parte*.

[241] Ameritech Update Reply at 21.

[242] Petition at A-13.

[243] Update at 14-15.

[244] Ameritech Update Reply at 18. Ameritech states in its original Reply that it does not propose to increase the SLC at this time. Ameritech Reply at 26, G-2 n.5.

commissions to apportion loop costs among local and long-distance users, and argues that residential and other end-users would face increased rates.[245] The General Services Administration urges the Commission to "revisit" the SLC cap, but agrees that bulk billing could suffice as an interim measure.[246] NYNEX advocates increasing the SLC as a long-term solution to certain pricing distortions created by the existing switched access charge regime.[247] Southwestern Bell states that, even if the Commission grants Ameritech a waiver to implement is bulk billing plan, the Commission should not foreclose other LECs from proposing other mechanisms for recovering loop costs such as increasing the SLC.[248]

97. AT&T argues that, rather than adopting Ameritech's proposal, the Commission should allow Ameritech to recover the SLC, as well as a flat charge representing the remaining interstate loop costs not recovered by the SLC, from companies that buy Ameritech's unbundled loops.[249] AT&T characterizes such an approach as consistent with the waivers the Commission granted in connection with Rochester's Open Market Plan.[250] Ameritech responds that its provision of unbundled loops is an intrastate offering. Because Ameritech intends to recover all of the costs of the unbundled loop via its intrastate unbundled loop charge, the federal SLC would not apply to unbundled loops. Consequently, as loops are converted to unbundled status, they would be removed from the interstate common line revenue requirement and the bulk-billed costs attributable to common line costs would be reduced.[251]

c. Transport Interconnection Charge

98. Several commenters raise specific objections to Ameritech's characterization of 50 percent of the TIC as a "public policy element." The General Services Administration and MFS state that the TIC, regardless of whether it is "correctly" allocated, recovers Ameritech's own costs, and therefore should not be recovered through a "de facto tax on interexchange carriers."[252] Sprint and CompTel argue that Ameritech has not sufficiently

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[245] AARP Comments at 19-20.

[246] General Services Administration Reply at 15.

[247] NYNEX Comments at 31.

[248] Southwestern Bell Update Comments at 2.

[249] AT&T Update Comments at 33.

[250] *Id.* (citing *Rochester Waiver Order*, 10 FCC Rcd 6776 (1995)).

[251] Ameritech Update Reply at 18 & n.44.

[252] MFS Comments at 6. *See also* General Services Administration Reply at 16.

explained the basis of its claim that the TIC subsidizes tandem switching costs.[253] CompTel contends that Ameritech's own cost analyses, entered into the record before the Illinois Commerce Commission, show that Ameritech's current tandem switching rate exceeds its tandem switching costs.[254] CompTel also argues that Ameritech has skewed the design of its network to favor direct-trunked traffic over tandem switched traffic, and that Ameritech should not be permitted to impose costs on IXCs that result from Ameritech's own network design and pricing practices.[255]

99. Ameritech responds that its proposal for bulk billing 50 percent of the TIC is "a modest one."[256] Ameritech contends that the TIC was established as a temporary mechanism to recover certain public policy costs associated with transport rates in conjunction with the transition away from the old "equal charge per minute of use" rule.[257] According to Ameritech, the Commission's intent in the *Transport* docket was that the TIC eventually be recovered from all users of switched transport, including those utilizing non-LEC providers.[258] Ameritech notes that it has already voluntarily reduced its TIC by $59.4 million, and that it would remain responsible for recovering 50 percent of the TIC from its customers under its plan. Consequently, Ameritech argues that it would not be guaranteed recovery of its TIC costs under the bulk billing proposal.[259]

2. Discussion

a. Overview

100. As discussed above, we conclude that the competitive conditions in the portions of the Chicago and Grand Rapids LATAs within Illinois and Michigan merit some interim regulatory relief, pending a comprehensive review of access charges. In the following sections, we address the issues raised by Ameritech's bulk billing proposal and discuss why granting limited waivers to Ameritech will better serve the public interest than

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[253] CompTel Update Comments at 14; Sprint Update Comments at 18.

[254] CompTel Update Comments at 14.

[255] *Id.* at 15.

[256] Ameritech Update Reply at 21.

[257] *Id.* at 19-20.

[258] *Id.* at 20.

[259] *Id.* at 22.

application of the Commission's rules. We do not address Ameritech's proposals relating to pricing flexibility. We intend to consider those requests in a future order.

101. Artificially high per-minute rates for switched access tend to suppress demand for switched access and long-distance services. Switched access rates that are set above cost also create uneconomic incentives for IXCs to shift traffic from Ameritech's switched network to alternative carriers (or to Ameritech's special access lines, in cases where they would be less efficient than switched access).[260] In the monopoly environment that still persists in most areas of the country, rules that elevate LECs' per-minute switched access rates above economically-efficient levels may be sustainable and serve other policy objectives. In areas such as Chicago and Grand Rapids where competitive providers of access and exchange service have opportunities to grow, however, rules that raise a LEC's per-minute switched access rates above cost-based levels can result in inaccurate price signals to potential market entrants, thereby encouraging inefficient entry and wasteful investment decisions and preventing consumers from enjoying the full benefits of competition. Ameritech's proposal to remove certain charges from its switched access rates and to recover some of these charges in an alternative manner will help align its price of interstate switched access with the cost of providing this service. Such a development is particularly important in areas such as Chicago and Grand Rapids, where competition is most likely to occur and the competitive presence is greatest. Finally, the reduction in Ameritech's switched access rates in these areas should lead to lower overall access costs, stimulate growth in the purchase of access services, and establish a reasonable basis for a competitive access marketplace, thereby helping to maximize consumer welfare. Thus, the public interest will be better served by a grant of a limited waiver than it would by rigid adherence to the existing rules.

b. NECA Long Term Support

102. We conclude that Ameritech should be granted a waiver of Commission rules to remove the long-term support component of its CCL rate in the areas covered by this waiver and to recover these revenues through a bulk billing mechanism. As we noted in the *NYNEX USPP Order*, the long-term support payments do not compensate Ameritech for the costs it incurs in providing switched access.[261] Rather, Ameritech remits these revenues to NECA to contribute to the recovery of interstate common line costs of LECs in the NECA CCL pool. This mechanism ensures that those carriers can charge CCL rates that are no

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[260] As discussed above, the likelihood of this development will depend on the degree to which IXCs determine which access provider will be used. *See supra* note 172. Given the competitive developments in the Ameritech region, we are persuaded that the inefficient incentives created by the existing access rate structure pose a sufficient threat of competitive distortions to justify granting Ameritech the relief described herein.

[261] *NYNEX USPP Order*, 10 FCC Rcd at 7475 ¶¶ 71-72.

higher than the national average CCL rate, computed on the basis of the CCL costs of all LECs.[262] In the environment now existing in Chicago and Grand Rapids, the present method of collecting long term support revenues hinders Ameritech's ability to compete with carriers that do not bear this cost. All IXCs should be responsible for contributing their share of LTS payments, regardless of which access provider they use, and LTS payments should not alter the competitive balance between competing providers of local exchange service.

103. Commenters agree that long-term support payments represent a subsidy and should be recovered through some type of bulk billing arrangement.[263] Given the competitive circumstances of the Chicago and Grand Rapids LATAs, we find that Ameritech's recovery of long term support payments through per-minute switched access charges is inequitable and inefficient. We conclude that long-term support payments should be recovered through the bulk billing mechanism proposed by Ameritech, subject to the modifications we discuss below. .

104. We find that the mechanics of bulk billing as proposed by Ameritech are generally reasonable and we permit the creation of a bulk billing mechanism subject to the adjustments and conditions specified herein. MFS argues that because loop costs are non-traffic sensitive, the Commission should require Ameritech to determine each IXC's market share based on the number of access lines presubscribed to each IXC, as we did with NYNEX's bulk billing proposal.[264] We agree with MFS that the non-traffic sensitive nature of loop costs is an important consideration in the allocation of loop costs. However, in the context of ascertaining market share for bulk billing of NECA long-term support revenues, the measuring factor (minutes of use or number of presubscribed access lines) is less significant than it would be in other contexts. The total amount of Ameritech's LTS payments is determined by NECA and therefore will not be affected by the allocation method used in Ameritech's bulk billing mechanism. We conclude that, for purposes of this waiver, Ameritech's proposed method for allocating bulk billed costs among IXCs is reasonable. Allocating these costs on the basis of switched access minutes of use is a reasonable method, as IXCs currently pay these charges through switched access rates that are assessed based on minutes of use. Accordingly, we will permit Ameritech to establish each IXC's share of the bulk billed charges based on each IXC's interstate switched minutes of use provided to end

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[262] *See supra* note 9 for further discussion of the rationale for LTS payments.

[263] *See, e.g.*, AT&T Comments at 2, 34; CompTel Update Comments at 13.

[264] MFS Update Comments at 5-6 (citing *NYNEX USPP Order*, 10 FCC Rcd at 7477-78 ¶ 79).

users and originating or terminating in the portion of the Chicago and Grand Rapids LATAs within Illinois and Michigan.[265]

105. We also determine that Ameritech's proposal to fund an independent billing organization is an acceptable mechanism for collecting bulk billed funds. We are persuaded that this arrangement will prevent Ameritech from ascertaining proprietary market share data from its competitors. We direct Ameritech to ensure that the billing agent is in place no later than the end of the first year of bulk billing (as Ameritech proposes), and sooner if possible. To enhance the independence of this entity, we direct Ameritech to work with IXCs and competitive local service providers in the establishment or selection of the entity, and we expect Ameritech to report periodically to our staff regarding the implementation of this billing process.

106. Finally, we modify that aspect of Ameritech's bulk billing proposal that would require IXCs to report their total interstate switched minutes of use in the territories subject to the waiver annually.[266] As proposed by Ameritech, each IXC would pay a portion of the bulk billed charges based on its market share from the previous year.[267] We agree with the Indiana Utility Consumer Counselor that reporting market share on an annual basis could create an unnecessary and unacceptable lag time.[268] This lag could result in undercharging an IXC whose market share is increasing, such as a newly-created interexchange subsidiary of Ameritech, and overcharging an IXC whose market share is diminishing. Therefore, we conclude that IXCs operating in the Chicago and Grand Rapids LATAs should provide updated information to the independent organization no less frequently than quarterly. The billing agent should recalculate each IXC's monthly share of bulk-billed costs on the basis of this updated information.

c. Common Line Recovery

107. *Overview.* The CCL charge also recovers a portion of Ameritech's interstate loop costs. Pursuant to our Part 36 and Part 69 rules, Ameritech each year calculates its common line revenue requirement on the basis of its forecasted loop costs for that year. Twenty-five percent of this annual common line revenue requirement is then assigned to the interstate jurisdiction according to the jurisdictional separations rules. The multi-line

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[265] The minutes of use included in this measure should include those that originate or terminate through Ameritech's or a competing provider's local switching facilities, but should not include traffic originating or terminating over Ameritech's or a competitor's special access (non-switched) facilities.

[266] Update, Attach. D.

[267] *See supra* para. 30.

[268] Indiana Utility Consumer Counselor Comments at 32-33.

business SLC is determined by dividing this interstate revenue requirement, on a per-month basis, by the total number of subscriber lines in the Ameritech region.[269] Although the majority of Ameritech's loop costs that have been assigned to the interstate jurisdiction are now recovered directly from local subscribers through the SLC, the residential SLC is capped at $3.50 per line per month, which does not fully recover the costs of Ameritech's residential loops.[270] The remaining loop costs, although they are not traffic sensitive, are recovered on a minutes-of-use basis through the CCL charge paid to Ameritech by IXCs. Ameritech argues that, like its long term support payments, common line costs recovered through the CCL represent a regulatorily-imposed surcharge on Ameritech's per-minute switched access rates assessed on the traffic of most end-user customers. Therefore, Ameritech proposes that this element also be removed from the per-minute CCL charge.

108. We conclude that Ameritech has demonstrated that, under the special circumstances present in the Chicago and Grand Rapids LATAs, and subject to certain conditions, the public interest would, on an interim basis, be served by the removal of the costs of common line recovery from Ameritech's per-minute switched access rates assessed on IXCs in those LATAs. We therefore grant Ameritech a waiver to remove its interstate common line costs from the CCL charge applicable to minutes originating or terminating in the two affected LATAs, and to recover those costs through a modified bulk billing mechanism. Such a waiver, similar to the one we granted to NYNEX in the *NYNEX USPP Order*, would eliminate a pricing distortion that, in the increasingly competitive environment in the waiver territories, could stimulate uneconomic entry and divert traffic from Ameritech to less-efficient competitors.

109. *Treatment of Common Line Costs.* We have long recognized that the per-minute recovery of local loop costs leads to price distortions.[271] The recovery of non-traffic sensitive local loop costs through a usage charge on interexchange carriers tends to shift cost recovery onto high-volume long-distance users, thereby artificially suppressing demand for long-distance services. In addition, IXCs currently pay more, in usage-sensitive CCL charges, to serve customers with higher usage levels than they pay to serve other customers,

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[269] In study areas where the multi-line business SLC would be greater than $6.00 per month according to this formula, the multi-line business SLC is set at $6.00. In Ameritech's serving area, the multi-line business SLC is below the $6.00 cap in all five states.

[270] According to data presented by Ameritech, the portion of common line costs allocated to the interstate jurisdiction that is not recovered through the current SLC for residential and single-line business users equates to $0.43 per line per month in Illinois and $1.65 per line per month in Michigan. Ameritech June 2, 1995 *Ex parte*.

[271] *See, e.g., NYNEX USPP Order*, 10 FCC Rcd at 7575-76 ¶ 73; *MTS and WATS Market Structure*, Report and Order, 2 FCC Rcd 2953, 2954, ¶¶ 9-11, 2957, ¶¶ 28-29 (1987) (*Common Line Cost Recovery Order*).

even though Ameritech's costs to provide loops to those high-volume users are not higher than for low-volume users.

110. The removal of the common line recovery element from the per-minute CCL charge would create significant public interest benefits. In a competitive environment like that developing in Chicago and Grand Rapids, other carriers that can charge access rates that more closely reflect the cost of providing service may be able to price their per-minute switched access services below those of Ameritech. Such price variations would result solely from the regulatory process, rather than from any underlying differences between the carriers' cost structures. Competitors might find it profitable to enter the access market even when those competitors experience higher costs than Ameritech, because Ameritech's access rates are inflated above the level that would reflect its costs, and its ability to respond to the presence of competitors by lowering its usage-sensitive rates closer to cost is limited. Such inefficient entry would lead to wasteful investment and distorted pricing. Moreover, as higher-volume users abandon Ameritech purely to avoid paying rates that reflect an access rate structure that shifts costs from long-distance to residential users, the funding base for that mechanism will erode. Ameritech might be forced to increase its per-minute CCL charge in order to recover its costs, thus increasing the access charges paid by IXCs and possibly forcing those IXCs to increase their long-distance rates.

111. These distorted incentives generally have not resulted in significant deleterious consequences in the past because of the presence of other barriers to competition. The current access rate structure was established in an environment in which incumbent LECs held a monopoly -- often legally-enforced -- on providing local exchange service, including local loops and switching. Legal, technical, and economic barriers effectively precluded potential competitors from challenging the local switching and loop elements of incumbent LECs' interstate switched access offerings, so that competitive entry into this segment of the access market has been extremely limited. Such an environment persists in much of the country. As described in detail above in our discussion of special circumstances, however, competition for a wide array of services, including the local switching and loop elements of interstate switched access, has begun to develop in parts of Illinois and Michigan. With other barriers to entry eliminated, pricing distortions created by the federal access charge structure will exert far greater importance upon carriers' investment decisions and ultimate consumer welfare than they have previously. Under these circumstances, we conclude that the removal of interstate loop costs from the CCL charge paid by IXCs serving customers in the Chicago and Grand Rapids LATAs will better serve the public interest than application of the existing rules.

112. *Bulk Billing.* We conclude that granting Ameritech a waiver to recover the portion of its common line costs currently recovered through per-minute interstate access charges through a bulk-billed charge on IXCs, with certain technical modifications, would better serve the public interest than the continued operation of the current rules. Bulk billing

would address the problem of inefficient entry created by application of the existing method for recovering common line costs to the areas covered by the waiver, because Ameritech's per-minute interstate switched access rates would more closely track Ameritech's costs of providing switched access. Moreover, bulk billing could be implemented relatively easily and without creating substantial additional burdens on other carriers.

113. Bulk billing based on interstate switched minutes of use provided to end users would allow recovery of interstate loop costs to be allocated among IXCs in the same relative proportions, initially, as under the existing rules. As discussed above in the context of Ameritech's waiver request for its long-term support payments, we believe that an allocation among IXCs based on minutes of use is a reasonable mechanism of determining relative market share for bulk billing purposes.[272] We also incorporate herein our conclusions above that the independent billing agent proposed by Ameritech would be sufficiently impartial, and that the billing agent should assess monthly bulk-billed charges to IXCs on the basis of quarterly market share data.[273] With the implementation of bulk billing, Ameritech's per-minute interstate switched access rates would be reduced to a point that more closely reflects Ameritech's actual costs of providing access, thus allowing competition to develop on the basis of more rational pricing and investment decisions.

114. Ameritech's bulk billing proposal does raise competitive concerns, however, and even Ameritech admits that bulk billing is not a long-term industry-wide solution to the problems engendered by the effects of nascent competition on the current access rate structure. These concerns, however, are not fatal to the proposal, subject to the modifications discussed below. First, bulk billing of the common line recovery element of the CCL charge would alleviate incentives for inefficient entry, but would not address the more fundamental problem -- the recovery of non-traffic sensitive loop costs from end users on a usage basis (indirectly, through long-distance rates). Bulk billing would merely shift existing misallocated loop costs from per-minute access rates to a bulk-billed charge. We do not believe that this characteristic justifies rejection of Ameritech's proposal. To the extent that bulk billing is an appropriate interim measure that, in Ameritech's case, would serve the public interest, we should not refuse to grant a waiver because certain broader industry-wide problems remain to be addressed.

115. Second, unlike long-term support, the common line recovery component of the CCL charge recovers Ameritech's own costs. Ameritech's bulk billing mechanism as proposed therefore effectively would require IXCs to pay a portion of Ameritech's loop costs even when they completely bypass Ameritech's loops. In addition, because Ameritech would be able to recover a portion of its costs for loops that have been bypassed by competing

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[272] *See supra* para. 104.

[273] *See supra* paras. 105-06.

providers, Ameritech would have a greater assurance of a revenue stream than under the current system. Currently, Ameritech recovers its interstate common line costs not recovered through the SLC through a per-minute CCL charge based solely on minutes passing through Ameritech switches, while under Ameritech's proposal Ameritech would recover these costs even for traffic that totally bypasses the Ameritech network. As a result, Ameritech's incentives to operate efficiently could be reduced. Under Ameritech's proposal, even when an IXC's end users switch from using Ameritech loops to an alternative facilities-based providers' loops, that IXC would not see a decrease in its bulk-billed costs on an incremental basis, because the minutes passing over the competitor's loop would still be counted in determining that IXC's bulk-billed charge. These IXCs would therefore have incentives to use Ameritech loops even when Ameritech is not the lowest-cost loop provider. Ameritech's proposal to remove the cost of unbundled loops sold to competitors from the interstate common line revenue requirement has no relevance to this competitive concern regarding facilities-based bypass. Thus, we reject Ameritech's proposal to include all retail toll minutes sold to end users in the waiver territories in the calculation of bulk-billed charges.

116. Instead, we require that the bulk-billed charge for the recovery of common line costs be calculated solely on the basis of traffic originated or terminated over loops that Ameritech sells to end users. This change is consistent with the bulk billing mechanism we recently permitted NYNEX to implement.[274] The recovery of common line revenues associated with both unbundled and bundled loops sold to resellers will be addressed in the context of a separate Part 69 waiver petition Ameritech has filed on that subject.[275]

117. Finally, under Ameritech's bulk billing proposal, competing providers of local telephone service to residential and single-line business customers would have to recover all of their loop costs through the rates they charge end users and/or IXCs, whereas Ameritech's flat subscriber line charges for these customers would be, in effect, subsidized by the recovery of a portion of Ameritech's loop costs directly from IXCs. With the limitations we have placed on Ameritech's bulk billing mechanism, however, this distortion should be no greater than it is today. Our requirement that Ameritech assess bulk-billed charges based only on traffic passing over Ameritech loops means that when an IXC's end-user customer switches from Ameritech to a facilities-based competitor, that IXC's bulk-billed charge will decrease, because the switched access minutes attributable to that end-user customer will be

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[274] *NYNEX USPP Order*, 10 FCC Rcd at 7478 ¶¶ 81-82.

[275] *See* Ameritech Petition for Waiver of Part 69 of the Commission's Rules to Permit the Assessment of the End User Common Line Charge to Reseller of Local Exchange Service, CCBPol 95-27 (filed Nov. 30, 1995).

removed from Ameritech's bulk billing calculation.[276] Competing local service providers could recover their loop costs in a cost-causative manner, or, if they wish, in the same manner as Ameritech: with flat rates to residential and single-line business end-users set somewhat below cost, and the remainder recovered through per-minute access charges to IXCs. Assuming that Ameritech and the competing local service provider have equivalent cost structures, the reduced bulk-billed charge from switching to the competitor will mirror the difference between the "subsidized" SLC charged by Ameritech and the competitor's charge to recover the full interstate cost of the loop. As a result, the bulk billing mechanism will give IXCs no different incentives than exist today in choosing either Ameritech or competing providers of interstate access. While, as noted earlier, bulk billing raises some concerns about competitive distortions, we conclude that, as an interim measure, pending a more comprehensive reform of our access charge rules, bulk billing under the conditions we have described better serves the public interest than the existing rules by reducing incentives for inefficient entry.

118. We grant Ameritech substantial flexibility in implementing this bulk billing mechanism. Specifically, we allow Ameritech to decide whether to allocate bulk-billed common line costs among IXCs on the basis of minutes of use (as Ameritech proposes), presubscribed lines (as we permitted NYNEX to do in the *NYNEX USPP Order*), or interstate access revenues received by Ameritech from the respective IXCs.[277] Although a minutes of use allocator more closely tracks the existing distribution among IXCs, a presubscribed line allocator would more closely mimic the effect of increasing the subscriber line charge, especially if IXCs flow through the charge to their customers on a flat per-line basis.

119. The independent billing agent will be required to assess the bulk-billed charges to IXC based on data collected no less frequently than quarterly. Because we are requiring Ameritech to use only minutes passing over Ameritech loops in determining the bulk-billed charge, Ameritech's bulk billing revenues will decrease as traffic shifts from Ameritech to facilities-based competitors. This restriction will help ensure that bulk billing would only give Ameritech a reasonable opportunity to recover its costs, and would not guarantee Ameritech recovery of its full monopoly revenue stream, as some commenters suggest. Ameritech must also, as it proposes, cap the costs recoverable through bulk billing on a per-line basis, so that any annual increase in the total level of bulk-billed recovery would be attributable solely to growth in the number of lines provided by Ameritech. Even if Ameritech's per-line loop costs increase over time, Ameritech will be limited to recovering a

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[276] As stated in the previous paragraph, the method by which Ameritech may recover common line costs when competitors resell, rather than bypass, Ameritech loops will be addressed in connection with Ameritech's Part 69 waiver petition on that subject.

[277] An allocation based on revenue would closely resemble an allocation based on minutes of use, because Ameritech's gross access revenues are generally derived from per-minute charges.

total amount through bulk billing equivalent to the cost per line during the first year in which bulk billing is put into effect. As competitors enter the access market, Ameritech's rates will be subject to market pressures, and Ameritech will be required to increase its productivity while keeping rates at reasonable levels in order to retain its current customers and to obtain new business. Moreover, we accept Ameritech's commitment to remove the cost of loops sold to competitors from its interstate CCL revenue requirement.[278]

120. Therefore, the monthly bulk-billed charges on IXCs will be determined by the following calculations. For each state, Ameritech should first determine the total annual amount to be recovered.[279] To determine this amount, Ameritech should divide the base factor portion overflow in the state by the CCL revenue requirement for that state to determine the percentage of the total per-minute CCL rate that recovers common line costs in that state. This percentage should be multiplied by the per-minute regional CCL rate, calculated as under the status quo, to obtain the per-minute common line recovery element, which should then be multiplied by the total number of interstate switched toll minutes passing over Ameritech common lines in the waiver territories in that state to determine the total amount to be recovered through bulk billing in that state. Ameritech would then allocate the total bulk-billed amount among IXC on the basis of those IXCs' market share based on presubscribed lines, minutes, or gross revenues.

121. *Implementation Issues.* Ameritech must continue to include its waiver-area lines and minutes of use in its calculations of the per-minute CCL charges for the areas not subject to this order. This condition is necessary to protect customers elsewhere in the Ameritech region. Although Ameritech's loop costs vary from state to state, Ameritech currently has one averaged CCL charge for its entire region.[280] Areas such as the Chicago LATA, which generally have higher densities (and thus lower loop costs) than elsewhere in Illinois, tend to bring down the average loop cost and the per-minute CCL charge. Thus, this requirement should prevent undue increases in the CCL rates paid by customers outside the LATAs subject to this waiver.

122. For the purpose of adjusting the price cap index (PCI) for the common line basket, we direct Ameritech to determine the growth factor based on the number of bundled

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[278] We do not, however, waive our Part 36 Rules, and we take no position on whether Ameritech's proposal in this area complies with our jurisdictional separations rules.

[279] This calculation uses a methodology similar to that described by Ameritech in its Update, modified according to the requirements described in this order. *See* Update, Attach. D.

[280] Ameritech has chosen to average its CCL charge, rather than calculating the charge on a state-by-state basis. Our rules do not prohibit Ameritech from using a different CCL charge for each of the states it serves, and nothing in this order should be taken as imposing such a restriction.

loops it provides, excluding all unbundled loops.[281] The PCI is adjusted through the growth factor to account for the cost reductions resulting from increased usage over a fixed number of common lines. If we were to permit the growth factor to include Ameritech's unbundled loops, any growth in usage on the unbundled loops would be attributed to Ameritech. Such incentives are inappropriate when the traffic traversing common lines is being handled by a competing carrier.[282] Moreover, Ameritech cannot measure the traffic on unbundled loops it has sold to competing local exchange providers. Including those loops in the calculation of the growth factor would either show those loops as having no traffic, or would require competitors to report to Ameritech the minutes passing over unbundled loops they had purchased.

123. *Other Issues Raised by Commenters.* Contrary to some parties' arguments, Ameritech has presented sufficient data to support a waiver to alter the recovery of the common line component of its CCL charge. With its *ex parte* filings, Ameritech has provided sufficiently-detailed information about its average loop costs and CCL charge rates on which to base the grant of a waiver. Ameritech need not make any additional showing of the level of "subsidy" embedded in CCL rates to justify a waiver. As we have stated above, the recovery of non-traffic sensitive loop costs in per-minute access rates charged to IXCs inherently shifts a cost burden from lower-volume users to higher-volume users, and from end users who make predominantly local calls to those who are heavy long-distance users. There is no uncertainty about the origin of the costs recovered through the CCL charge, unlike, for example, the transport interconnection charge. Of course, when Ameritech files a tariff implementing this waiver, it will be required to provide the requisite cost support data, including information demonstrating that the revenues associated with bulk billing do not exceed the amount by which the CCL charge is reduced, and that all applicable price cap restrictions are satisfied.

124. We decline to adopt AT&T's alternative proposal to allow Ameritech to recover its loop costs from companies that purchase unbundled loops. AT&T's suggestion departs substantially from Ameritech's waiver request, and the record before us is insufficient to consider such a proposal. As we concluded in the *Rochester Waiver Order*, the model described by AT&T may be a reasonable method for recovering CCL charges from parties that purchase unbundled loops but no switching from the LEC.[283] AT&T's

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[281] The growth factor is the percentage change between the minutes of use per access line during the base period and the minutes of use per access line during the previous base period. *See* 47 C.F.R. § 61.45(c).

[282] In addition, we recently determined that it is not necessary to create price cap incentives for LECs to increase growth in common line usage, because they have little influence over such growth. *Price Cap Performance Review for Local Exchange Carriers*, First Report and Order, FCC 95-132, CC Docket No. 94-1 ¶¶ 264-73 (released April 7, 1995).

[283] *Rochester Waiver Order*, 10 FCC Rcd 6776 (1995).

proposal, however, appears not to address the problem identified by Ameritech: the uneconomic effects of recovering common line costs through the per-minute CCL assessed on all access customers, not only purchasers of unbundled loops. Although AT&T raises some intriguing issues, we choose not to explore them in this waiver proceeding.

125. In response to the American Petroleum Institute's argument that Ameritech's proposal for the recovery of common line costs is inconsistent with the 1986 *Guidelines Order*,[284] we note that in the *NYNEX USPP Order* we specifically concluded that the criteria in the *Guidelines Order* are no longer controlling with respect to our decision to grant or to deny a waiver to recover some non-traffic sensitive costs in an alternative manner.[285] We see no reason to find otherwise in the context of Ameritech's Petition. As we found in the *NYNEX USPP Order*, regulatory and market conditions have changed substantially in recent years, to the point at which the *Guidelines Order* should no longer apply.

d. Transport Interconnection Charge

126. Ameritech's final request for a bulk billing waiver involves the transport interconnection charge. The TIC was established on an interim basis as part of the Commission's efforts to implement a more cost-based structure for switched transport pricing.[286] We established the TIC initially at a residual level to provide the LECs with revenue neutrality during the shift from the "equal charge per minute of use" rate structure mandated by the MFJ court at divestiture to the more cost-based interim transport rate structure. We have acknowledged our uncertainty about the nature of the costs recovered through this charge, and have asked parties to provide estimates of the breakdown of costs now embedded in the TIC.[287]

127. Ameritech provides little support for its claim that 50 percent of the TIC represents a "public policy element." In its Update, Ameritech refers generally to "inefficiencies" created by the equal charge structure, and claims that the TIC includes costs that should be allocated to tandem switching rates. We conclude that this showing does not provide a sufficient basis to allow Ameritech to bulk bill 50 percent of the TIC. In the context of the CCL charge, we have agreed to permit Ameritech to bulk bill IXCs for certain costs whose level and origins are well-established. By contrast, Ameritech's "Public Policy

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[284] *Petition for Waiver of Various Sections of Part 69 of the Commission's Rules*, 104 FCC 2d 1132 (1986).

[285] *NYNEX USPP Order*, 10 FCC Rcd at 7474-75 ¶¶ 69-70.

[286] *See generally Transport Rate Structure and Pricing*, Third Memorandum Opinion and Order on Reconsideration and Supplemental Notice of Proposed Rulemaking, 10 FCC Rcd 3030 (1994).

[287] *Transport Rate Structure and Pricing*, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 7006, 7063-66 ¶¶ 133-41 (1992) (*First Transport Order*).

Element" of the TIC represents an arbitrarily-defined component of a rate element that was originally established on a residual basis, rather than to recover the costs of providing any specific service. Numerous parties have submitted comments in the *Transport* proceeding on the nature of revenues recovered by the TIC. Ameritech fails to address that record or to offer any detailed analysis that would lead us to accept its characterization of the TIC in this waiver proceeding. We recently rejected a request by NYNEX to bulk bill the TIC, on the grounds that NYNEX had not provided convincing information about the composition of the TIC.[288] Based on the current record, we decline at this time to grant Ameritech a waiver to implement its specific proposal to bulk bill an arbitrary percentage of the TIC.

128. Although we reject Ameritech's request for bulk billing of part of the TIC, we recognize that the TIC was originally established at a residual, rather than a cost-based, level, and that it is likely that the TIC includes some revenues not attributable to the costs of providing transport services. In a competitive environment, the presence of the TIC in Ameritech's rates may artificially inflate Ameritech's switched transport prices and create inefficient incentives for carriers to bypass Ameritech's transport network, especially in high-density areas. Ameritech also seeks a waiver to establish different TIC rates in different geographic zones. Unlike bulk billing, deaveraging would not force carriers to pay an imperfectly-understood portion of Ameritech's rates regardless of whether they purchase switched transport from Ameritech. Such a waiver would, however, address the concerns Ameritech raises about competitive distortions created by the TIC, because Ameritech would be able to respond to the growing competition in Chicago and Grand Rapids by lowering its TIC rate in those areas.

129. Geographic deaveraging of the TIC would create significant public interest benefits. The TIC includes some revenues related to transport costs, which we have already found are lower in higher-density zones. To the extent that the transport interconnection charge recovers revenues related to the costs of other access elements or other telecommunications services, these costs also are likely to be lower in zones with a more dense concentration of traffic. Geographic deaveraging would therefore allow Ameritech to move its prices towards cost in Chicago and Grand Rapids, reducing incorrect pricing signals that could trigger entry by competitors that may be less efficient than Ameritech. Moreover, the densest zones represent the areas in which competition is likely to grow most rapidly. By permitting Ameritech to move its prices towards cost in those areas that have the densest traffic patterns and are open to competitive entry, we will enable Ameritech to minimize distortions in the total switched access per-minute rate that have the greatest adverse impact.

130. With the implementation of the Customers First Plan at the state level, competitive service providers will be able to use Ameritech's unbundled loops to bypass some of Ameritech's switched access services. Therefore, Ameritech is likely to be under

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[288] *NYNEX USPP Order*, 10 FCC Rcd at 7467-68 ¶¶ 52-53.

some competitive pressure to reduce its per-minute transport interconnection charge in high-density zones. Permitting Ameritech to deaverage this charge would enable Ameritech to target rate reductions to the zone in which customers are most likely to bypass its switched services in favor of potentially less efficient services. We conclude that the public interest would be served by giving Ameritech the flexibility to respond in this way to the market conditions that exist in Chicago and Grand Rapids, which, in the previous section of this order, we found constitute special circumstances. This waiver is comparable to the waiver we granted to NYNEX in the *NYNEX USPP Order*.[289]

131. We therefore conclude that the public interest will be served by permitting Ameritech to reduce the TIC on a geographically-deaveraged basis for the Chicago and Grand Rapids LATAs. Ameritech may establish four separate rate elements within the interconnection charge category, one for each of the three density pricing zones in the LATAs covered by the waiver, and a baseline element for usage outside the two affected LATAs. In order to ensure that other customers are not harmed by Ameritech's reduction of the TIC in the waiver area, Ameritech's geographic deaveraging of the TIC will be subject to three conditions. First, Ameritech may not raise any interconnection charge rate above the interconnection charge rate that is in its tariff on the day before the tariff implementing this aspect of the waiver takes effect.[290] Thus, Ameritech will not be able to raise the rate for any interconnection charge element to offset a reduction in the rate for another interconnection charge element. Second, Ameritech may not, once it lowers the rate for any interconnection charge element, thereafter raise the rate for that element. This will prevent Ameritech from alternatively raising or lowering the rate for one element deliberately to undermine a rival's business plan. Third, because some of the revenues recovered through the interconnection charge are transport-related, we believe it necessary to establish a floor below which the rate for the interconnection charge may not go.[291] Therefore, we conclude that the rate for any interconnection charge must be sufficient to recover the share of fully-allocated tandem switching costs that are included in the interconnection charge.[292]

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[289] *Id.*, 10 FCC Rcd at 7468-70 ¶¶ 54-58. *See also Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7454-56.

[290] Since Ameritech has characterized this waiver as being interim in nature, we have not provided for upward pricing flexibility to reflect increases in the PCI. If we expected this waiver to be of a more permanent nature, we would have considered an upward PCI adjustment mechanism.

[291] In the interim transport rate structure, we required that the tandem switching charge recover 20 percent of the fully allocated costs of tandem switching, with the remaining tandem switching costs initially recovered through the TIC. *First Transport Order*, 7 FCC Rcd at 7037-38.

[292] We take no position on the question of whether the tandem switching costs now recovered through the TIC should ultimately be recovered through the tandem switching charge. That issue will be addressed in the *Transport* proceeding.

IV. CONCLUSION

130. The steps that Ameritech has taken thus far in conjunction with the Illinois and Michigan commissions have significantly increased the opportunities for competitors to offer exchange and access services in competition with Ameritech. These steps, however, have also created a situation where application of certain of the Commission's rules would no longer be in the public interest. Continuing to require Ameritech's compliance with such rules might create uneconomic incentives and interfere with the efficient operation of an increasingly competitive market. In addition to preventing such unwanted distortions, the waivers we grant today should help achieve the Commission's goal of facilitating fair and efficient competition. Such competition will ultimately generate significant consumer benefits, including speedier technological innovation, increased carrier responsiveness and quality of service, and lower overall price levels. We recognize that the transformation from monopoly to fully competitive markets will not take place overnight. We also realize that the steps taken thus far will not result in the immediate arrival of fully-effective competition. Accordingly, the Commission and state regulators must continue to ensure against any anticompetitive abuse of residual monopoly power, and to protect consumers from the unfettered exercise of that power. As anticompetitive concerns recede in the face of competition, the Commission will continue to remove unnecessary regulatory restraints.[293]

132. We conclude that granting Ameritech waivers as described above will better serve the public interest than will the continued application of our existing rules. Ameritech has demonstrated that, as a result of the actions of Ameritech, state regulators, and competitors, special circumstances exist in portions of the Chicago and Grand Rapids LATAs within Illinois and Michigan. Under these conditions, limited waivers of some of our access charge rules for these areas are justified. We note that Ameritech has expressly characterized the Customers First Plan as interim in nature. As the telecommunications industry continues to evolve, we believe that there is a need for comprehensive access reform to consider more broadly issues such as those raised by Ameritech in this proceeding. Given the special circumstances described by Ameritech, however, we conclude that granting Ameritech the relief described herein represents an appropriate response to Ameritech's interim proposal.

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[293] *See NYNEX USPP Order*, 10 FCC Rcd 7445, Separate Statement of Commissioner Rachelle B. Chong.

V. ORDERING CLAUSES

133. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act, 47 U.S.C. §154(i), and Section 1.3 of the Commission's Rules, 47 C.F.R. §1.3, that the Ameritech Operating Companies' Petition for Waivers to Establish a New Regulatory Model for the Ameritech Region IS GRANTED IN PART subject to the limitations and conditions described herein; and

134. IT IS FURTHER ORDERED that the Ameritech Operating Companies' Petition for a Declaratory Ruling IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A -- LIST OF COMMENTERS

Comments on 1993 Petition

Alliance for Public Technology Board Members (Alliance for Public Technology)
Allnet (Allnet)
Association for Local Telecommunications Service (ALTS)
American Petroleum Institute (American Petroleum Institute)
American Association of Retired Persons (AARP)
Arizona Payphone Association (Arizona Payphone Association)
AT&T (AT&T)
Bell Atlantic (Bell Atlantic)
BellSouth (BellSouth)
Citizens for a Sound Economy (Citizens for a Sound Economy)
Competitive Telecommunications Association (CompTel)
GTE (GTE)
Illinois Commerce Commission (Illinois Commerce Commission)
Illinois Cable Television Association (Illinois Cable TV Association)
Independent Data Communications Manufacturers Association, Inc. (IDCMA)
Independent Coin Payphone Association (Independent Coin Payphone Association)
Independent Telecommunications Network (Independent Telecommunications Network)
Indiana Utility Consumer Counselor (Indiana Utility Consumer Counselor)
Indiana/Michigan/Ohio/Wisconsin commissions (Indiana/Michigan/Ohio/Wisconsin)
Information Technology Association (ITAA)
Information Industry Association (Information Industry Association)
International Communications Association (International Communications Association)
LCI (LCI)
LDDS (LDDS)
McCaw (McCaw)
MCI (MCI)
MFS (MFS)
Michigan Public Service Commission (Michigan PSC)
National Rural Telecom Association (National Rural Telecom Association)
National Telephone Cooperative Association (National Telephone Cooperative Association)
National Consumers League (National Consumers League)
Newspaper Association of America (Newspaper Association of America)
North American Telecommunications Association (North American Telecommunications Association)
Northern Telecom (Northern Telecom)
NYNEX (NYNEX)
Barbara O'Connor & Henry Geller (O'Connor & Geller)

Office of the Consumers' Counsel of Ohio (Ohio Consumers Counsel)
Organization for Protection and Advancement of Small Telephone Companies (OPASTCO)
Pacific Bell and Nevada Bell (Pacific Bell)
Kenneth Robinson, Attorney (Robinson)
Southwestern Bell (Southwestern Bell)
Sprint (Sprint)
John Staurulakis, Inc., on behalf of Indiana Exchange Carrier Association, Michigan Exchange Carriers Association, and Wisconsin telephone company clients (Staurulakis)
Teledial America (Teledial)
Teleport Communications Group (TCG)
Utilities Telecommunications Council (Utilities Telecommunications Council)
WilTel (WilTel)

Reply Comments on 1993 Petition

Ad Hoc Telecommunications Users Committee (Ad Hoc Reply)
American Association of Retired Persons (AARP Reply)
Ameritech (Ameritech Reply)
AT&T (AT&T Reply)
Bell Atlantic (Bell Atlantic Reply)
BellSouth (BellSouth Reply)
Citizens for a Sound Economy (Citizens for a Sound Economy Reply)
Cox Enterprises Inc. (Cox Reply)
Fleet Call (Fleet Call Reply)
General Services Administration (GSA Reply)
GTE (GTE Reply)
Illinois Cable Television Association (Illinois Cable TV Association Reply)
Illinois Commerce Commission (Illinois Commerce Commission Reply)
Illinois/Indiana/Michigan/Ohio/Wisconsin commissions (Illinois/Indiana/Michigan/Ohio/Wisconsin Reply)
Indiana Office of Utility Consumer Counselor (Indiana Office of Utility Consumer Counselor Reply)
International Communications Association (International Communications Association Reply)
McCaw (McCaw Reply)
MCI (MCI Reply)
MFS (MFS Reply)
North American Telecommunications Association (North American Telecommunications Association Reply)
Office of the Consumers' Counsel of Ohio (Ohio Consumers Counsel)
Ohio/Indiana/Wisconsin commissions (Ohio/Indiana/Wisconsin Reply)

Teleport Communications Group (TCG Reply)

Comments on 1995 Update

Allnet (Allnet Update)
Association for Local Telecommunications Services (ALTS Update)
AT&T (AT&T Update)
Bell Atlantic Telephone Companies (Bell Atlantic Update)
Competitive Telecommunications Association (CompTel Update)
General Services Administration (GSA Update)
Indiana/Michigan/Ohio/Wisconsin commission staff
(Indiana/Michigan/Ohio/Wisconsin Staff Update)
LDDS WorldCom (LDDS Update)
MCI Telecommunications Corporation (MCI Update)
MFS (MFS Update)
Michigan Public Service Commission (Michigan PSC Update)
Southwestern Bell (Southwestern Bell Update)
Sprint (Sprint Update)
Telecommunications Resellers Association (Telecommunications Resellers
Association Update)
Teleport Communications Group (TCG Update)
Time Warner Communications Holdings (Time Warner Update)
United States Telephone Association (USTA Update)
US Signal (US Signal Update)

Reply Comments on 1995 Update

Ameritech (Ameritech Update Reply)
AT&T (AT&T Update Reply)
MCI (MCI Update Reply)
MFS (MFS Update Reply)
Teleport Communications Group (TCG Update Reply)

EXHIBIT 31

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
APPLICATIONS OF AT&T, INC. AND DEUTSCHE TELEKOM AG	)	WT Docket No. 11-65
	)	
	)	
For Consent to Assign or Transfer Control of Licenses and Authorizations	)	
	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 2012 **Released: May 14, 2012**

By the Commission: Commissioner Rosenworcel not participating.

I. INTRODUCTION

1. By this memorandum opinion and order, we deny an application for review by the Diogenes Telecommunications Project (DTP), seeking review of a decision by the Office of General Counsel (OGC) denying DTP's complaint against AT&T, Inc. (AT&T) for violation of the ex parte rules.

II. BACKGROUND

2. DTP's complaint is related to the now withdrawn, proposed AT&T/T-Mobile transaction, which was the subject of WT Docket No. 11-65.[1] This matter was designated "permit-but-disclose" for purposes of the Commission's ex parte rules.[2] Thus, under 47 C.F.R. § 1.1206, written ex parte presentations and a summary of oral ex parte presentations had to be filed in the record of the proceeding.[3] DTP's complaint[4] alleged that AT&T failed to make the filings required by the rule.

[1] Because ex parte violations are subject to sanctions, the withdrawal of the applications does not moot the complaint.

[2] *See* Commission Announces That The Applications Proposing The Transfer Of Control Of The Licenses And Authorizations Held By T-Mobile USA, Inc. And Its Subsidiaries From Deutsche Telekom AG To AT&T, Inc. Have Been Filed And Permit-But-Disclose *Ex Parte* Procedures Now Apply, Public Notice, DA 11-722 (Apr. 21, 2011).

[3] A presentation is defined as a communication directed to the merits or outcome of the proceeding. *See* 47 C.F.R. § 1.1202(a). An ex parte presentation is a presentation that, if written, is not served on all the parties to the proceeding and if oral, is made without giving the parties advance notice and an opportunity to be present. *See* 47 C.F.R. § 1.1202(b).

[4] *See* Motion For An Order To Cease And Desist From Violations Of The Commission's Ex Parte Rules And To Dismiss The Applications, filed October 24, 2011, by DTP.

3. DTP's complaint stated:

> AT&T has engaged in an all out media campaign in the Washington, D.C. area for the purpose of influencing Federal Communications Commission (FCC) decision making personnel to grant the [applications related to the proposed AT&T/T-Mobile transaction]. Its issue oriented radio, television, and newspaper advertisements constitute oral and written presentations to the FCC in a permit-but-disclose proceeding. In failing to file memoranda documenting these ex parte presentations, AT&T has violated the FCC's ex parte rules and must be made to cease and desist this unlawful practice. Furthermore, since the improper oral and written presentations were made to all Commission decision making personnel, there can be no recusal of the tainted personnel. Therefore, the only solution consistent with the FCC's rules is to dismiss the applications with prejudice.[5]

4. OGC held that AT&T's mass media advertisements did not constitute presentations to decision-makers and, therefore, did not have to be reported under the ex parte rules.[6] OGC found that the advertisements were directed to the public at large and not specifically to decision-making personnel. OGC also found that the advertisements were not the type of undisclosed communications that the ex parte rules are primarily concerned with, because their public character gave interested parties an opportunity to respond. Further, OGC found that imposing sanctions based on such public speech would raise First Amendment concerns.[7]

III. APPLICATION FOR REVIEW

5. In its application for review,[8] DTP contends that AT&T's advertisements should be deemed presentations to decision-makers within the scope of the ex parte rules, and thus be subject to the filing requirements of section 1.1206. DTP asserts that AT&T's advertisements were directed to Commission decision-makers and not to the public at large.[9] In DTP's view, because AT&T's advertisements were distributed only in the Washington, D.C. area rather than nationally, their intent was to "pressure the FCC directly or indirectly, to grant [AT&T's] applications."[10] DTP contrasts these ads to ads in national or major markets intended to bolster AT&T's image or sell its products.

6. DTP proposes that the ex parte rules should be interpreted consistent with the definition of the term "lobbying contact" in the Lobbying Disclosure Act of 1995.[11] DTP observes that the term "lobbying contact" would include mass media advertising but for an express exception in that statute.[12]

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[5] *See id.* at 1-2 (footnotes omitted).

[6] *See* Letter from Joel Kaufman, Associate General Counsel to Arthur V. Belendiuk (Nov. 10, 2011).

[7] *See id.* at 2.

[8] *See* Application for Review, filed November 29, 2011, by DTP (AFR).

[9] *See* AFR at 2.

[10] *See id.* DTP analogizes AT&T's advertising campaign to picketing FCC headquarters. *See id.* at 3.

[11] *See id.* at 2-3; 2 U.S.C. §§ 1601 *et seq.*

[12] *See* 2 U.S.C. §§ 1602(8)(A) (defining lobbying contact as "any oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative official that is made on behalf of a client [with regard to specified topics]"); 1602(8)(B)(iii) (excluding from the term "lobbying contact" material distributed and made available to the public through the mass media).

DTP urges that the ex parte rules contain no similar exception that excludes mass media advertising from the scope of presentations to decision-makers.

7. DTP also disputes OGC's observation that the public nature of AT&T's advertising campaign gave the public notice of AT&T's communications.[13] DTP points out that only people in the Washington area would have known about AT&T's advertisements, whereas, if AT&T had complied with the filing requirements of the ex parte rules, people interested in the AT&T/T-Mobile proceeding could have accessed AT&T's filings in the Commission's Electronic Comment Filing System (ECFS) from anywhere in the country.

8. Finally, DTP asserts that OGC did not explain the nature of the "significant First Amendment concerns" that it raised.

III. DISCUSSION

9. We agree with OGC that mass media advertisements do not constitute presentations to decision-makers within the scope of section 1.1206. As OGC found, this interpretation is consistent with the primary purpose of the ex parte rules, which is preventing undisclosed communications that taint the fairness of the administrative process because they convey information to decision-makers that interested parties do not have an opportunity to rebut.[14] Mass media advertising is public communication of a character different from the type of private communication with decision-makers that the ex parte rules are designed to address.

10. We do not find any of DTP's arguments to the contrary persuasive. We disagree with DTP's contention that the fact the ads ran only in the Washington area and not all interested persons were necessarily aware of the ad campaign is pertinent to the analysis. As noted above, the ads were public in character, not private communications directed to decision-making personnel; the fact that the ads did not run nationwide does not change this analysis.

11. We also disagree with DTP's contention that because "mass media advertising" is not specifically excluded from the definition of "presentation to decision-making personnel" in our ex parte rules, we must read these rules to cover "mass media advertising." We do not find the statutory scheme of the Lobbying Disclosure Act to be controlling when interpreting our own ex parte rules, which are not statutorily required. DTP misapplies the tenet of statutory construction that where Congress includes language in one section of a statute but not in another, it is generally presumed that the disparity was intentional. This tenet has no applicability to different statutes,[15] let alone to a statute and an unrelated administrative regulation.

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[13] *See id.* at 3.

[14] *See Ex Parte Complaint of Marcus Spectrum Solutions, LLC,* 26 FCC Rcd 2351, 2355-56 ¶ 15 (2011) (because the purpose of the ex parte rules is to ensure the fairness and integrity of Commission decision-making, the Commission is principally concerned with ex parte violations that deprive interested persons of notice and an opportunity to respond to the violator's presentations); 47 C.F.R. § 1.1200(a) (the purpose of the ex parte rules is to ensure the fairness and integrity of Commission decision-making); *see also Power Auth. of the State of N.Y. v. FERC,* 743 F.2d 93, 110 (2d Cir. 1984) (finding the communication of undisclosed information to be a factor of particular significance in resolving the issue of whether ex parte contacts require the recusal of a decision-maker).

[15] *See Gomez-Perez v. Potter,* 553 U.S. 474, 486 (2008) (negative implication not applied to two provisions that were not considered or enacted together).

12. Nothing in our ex parte rules suggests that the rules are meant to apply to mass media presentations. Indeed, in some cases, the rules would be impossible to apply in the context of mass media advertisements. Our rules require, for example, that a filing summarizing an oral presentation include "the Commission employees who attended or otherwise participated in the presentation,"[16] a requirement which could not be applied to mass media advertisements.

13. Finally, we agree with OGC that applying our ex parte rules to mass media advertisements[17] could raise First Amendment concerns. Restrictions on even potentially misleading commercial advertising are permissible under the First Amendment *only* when they directly advance a substantial government interest and are not more extensive than is necessary to serve that interest.[18] We do not believe that imposing ex parte restrictions on mass media advertising is necessary to advance the governmental interest behind the ex parte rules. Further, section 1.1203 of the rules[19] bars all presentations, whether ex parte or not, during the sunshine period, which begins when an item is listed in a public notice for consideration at an agenda meeting. DTP's interpretation would have the effect of banning media advertising about such items entirely during that period, a result that is not contemplated by our rules. In sum, we believe that we should interpret our ex parte rules to avoid unnecessarily implicating the First Amendment, particularly when such an interpretation is not supported by the overall purpose and structure of the rules.

IV. ORDERING CLAUSE

14. ACCORDINGLY, IT IS ORDERED, that the application for review by Diogenes Telecommunications Project IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[16] *See* 47 C.F.R. § 1.1206(b)(2).

[17] We do not assume, as DTP suggests (AFR at 3), that picketing FCC headquarters is subject to the ex parte rules.

[18] *See, e.g., Public Citizen, Inc. v. Louisiana Attorney Disciplinary Board,* 632 F.3d 212, 218, 228-29 (5th Cir. 2011) (finding that Louisiana law regulating the font size and speech rate of required disclaimers in advertising was not justified and therefore unconstitutional).

[19] 47 C.F.R. § 1.1203.

EXHIBIT 32

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T Corp.,	)	
	)	
Complainant,	)	
	)	
v.	)	File No.: EB-09-MD-010
	)	
All American Telephone Co., e-Pinnacle Communications, Inc., ChaseCom,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Adopted: March 22, 2013 **Released: March 25, 2013**

By the Commission:

I. INTRODUCTION

1. On April 30, 2010, AT&T Corp. (AT&T) filed a formal complaint against All American Telephone Co. (All American), e-Pinnacle Communications, Inc. (e-Pinnacle), and ChaseCom (ChaseCom) (collectively, Defendants) under Section 208 of the Communications Act of 1934, as amended (Act).[1] Count I of the Complaint alleges that Defendants violated Sections 203 and 201(b) of the Act by billing AT&T for access services that were not properly provided pursuant to valid or applicable tariffs.[2] Count II of the Complaint alleges that Defendants violated Section 201(b) of the Act by undertaking sham arrangements to inflate billed access charges to AT&T and other long distance carriers.[3] Because the evidence shows that Defendants participated in an access stimulation scheme designed to collect in excess of eleven million dollars of improper terminating access charges from AT&T, we grant Counts I and II of the Complaint.[4]

[1] *See* Amended Formal Complaint of AT&T Corp., File No. EB-09-MD-010 (filed Apr. 30, 2010) (Complaint); 47 U.S.C. § 208. The litigation arises from a primary jurisdiction referral from the United States District Court for the Southern District of New York (the Court). The Commission directed the parties to effectuate the Court's referral by filing two formal complaints. *See* Letter Ruling from Lisa B. Griffin, Deputy Division Chief, EB, MDRD, to James F. Bendernagel, Jr., Counsel for AT&T, and Jonathan Canis, Counsel for Defendants, File No. EB-09-MD-010 (filed Apr. 2, 2010) (April 2 Letter Ruling). The parties did so, and the Commission previously resolved Defendants' complaint. *See All American v. AT&T Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 723 (2011).

[2] Complaint at 66–69, paras. 123–30; 47 U.S.C. §§ 201(b), 203.

[3] Complaint at 69–71, paras. 131–37; 47 U.S.C. § 201(b).

[4] AT&T also alleged in Count III of its Complaint that Defendants are unable to collect any compensation for access services under a *quantum meruit*, quasi-contract, constructive contract, or any other state law theory. Complaint at 71, paras. 138–42. Under Section 1.722(d) of the Commission's rules, AT&T elected to bifurcate its liability and damages claims. Complaint at 4, para. 8 (citing 47 C.F.R. § 1.722(d) (setting forth the requirements a complainant

(continued . . .)

II. BACKGROUND

A. Parties

2. AT&T is an interexchange carrier (IXC) providing interstate telecommunications service (also known as long-distance service) throughout the United States.[5] In order to originate and terminate long distance calls, IXCs such as AT&T must use the facilities of local exchange carriers (LECs).[6]

3. As discussed in more detail below, Defendants were formed and certificated by state commissions to be competitive local exchange carriers (CLECs). Rather than serving and competing to serve a broad range of customers in its local area, however, All American provided services in Nevada and Utah only to a single chat line/conferencing service provider (CSP), Joy Enterprises, Inc.[7] Similarly, ChaseCom and e-Pinnacle provided services in Utah exclusively to a few CSPs.[8]

B. Important Non-Parties

4. In addition to the parties, several other entities figure prominently in this litigation. First, Beehive Telephone Company, Inc., Nevada, and Beehive Telephone Company, Inc., Utah (collectively, Beehive) are incumbent local exchange carriers (ILECs) that serve approximately 800 to 1,000 access lines in rural territories in Nevada and Utah.[9]

5. Second, Joy Enterprises, Inc. (Joy) is a Nevada corporation with its principal place of business in Nevada.[10] Joy is a CSP that shares the same business address with All American.[11] Joy and All American also have common directors, officers, and ownership.[12]

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must satisfy if it "wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made")). Commission staff subsequently ruled that the issues raised in Count III of the Complaint will be addressed in AT&T's damages proceeding, if any. Letter Ruling from Lisa B. Griffin, Deputy Division Chief, EB, MDRD, to James F. Bendernagel, Jr., Counsel for AT&T, and Jonathan Canis, Counsel for CLECs, File No. EB-09-MD-010 (filed July 28, 2010) (Status Conference Order). Because this Order finds in AT&T's favor on liability, AT&T may file with the Commission a supplemental complaint for damages in accordance with 47 C.F.R. § 1.722(e) ("If a complainant proceeds pursuant to paragraph (d) of this section . . . the complainant may initiate a separate proceeding to obtain a determination of damages by filing a supplemental complaint . . . . ").

[5] Complaint at 6, para. 10.

[6] *See generally United States Tel. Ass'n v. FCC*, 188 F.3d 521, 523–24 (D.C. Cir. 1999).

[7] Complaint at 6, para. 11; All American Telephone Co., e-Pinnacle Communications, Inc., and ChaseCom's Answer to AT&T Corp.'s Amended Formal Complaint, File No. EB-09-MD-010 (filed June 14, 2010) (Answer) at 6–7, para. 11; Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, File Nos. EB-09-MD-010 and EB-10-MD-003 (July 16, 2010) (Joint Statement) at 2, Stipulation 2. CSPs generate very high volumes of incoming calls for which local exchange carriers (LECs) charge terminating access. *See Connect America Fund*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17874, para. 656 (2011) (*USF/ICC Transformation Order*), *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011).

[8] Complaint at 7–8, paras. 12–13; Answer at 7–8, paras. 12–13; Joint Statement at 2–3, Stipulations 3–4.

[9] Joint Statement at 3, Stipulation 6.

[10] *Id.*, Stipulation 7.

[11] Answer at 8, para. 16; Joint Statement at 4, Stipulation 8; *see* AT&T Ex. 79, *Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier Within the State of Utah*, Public Service Commission of Utah, Pre-Filed Direct Testimony of David W. Goodale on Behalf of All American Telephone Company, Inc., at 11–12 (Feb. 26, 2010) (All American Utah PSC Hearing Direct Testimony); *see also AT&T Corporation v. Beehive Telephone Company, Inc. and*
(continued . . .)

6. Finally, CHR Solutions, Inc. (CHR) is a Texas telecommunications consulting company that drafts and effectuates regulatory filings on behalf of its clients.[13] CHR provided regulatory services to Beehive and Defendants and drafted and filed the tariffs at issue.[14]

C. The Commission's Tariff Regime

7. The Commission regulates access charges that LECs apply to interstate calls.[15] As a general matter, ILECs must file and maintain tariffs with the Commission for interstate switched access services.[16] Commission rules provide rate-of-return LECs (such as Beehive) with alternate means for filing individual interstate access tariffs.[17] One option is to participate in the traffic-sensitive pool managed by the National Exchange Carrier Association (NECA) and in the traffic-sensitive tariff filed annually by NECA.[18] The rates in the traffic-sensitive tariff are set based on the projected aggregate costs (or average schedule settlements) and demand of all pool members and are targeted to achieve an 11.25 percent return.[19] Each participating carrier historically received a settlement from the pool based on its costs plus a pro rata share of the profits, or based on its settlement pursuant to the average schedule formulas.[20] Stated differently, all NECA pool members share revenues in excess of costs.

8. Alternatively, a rate-of-return carrier that has 50,000 or fewer access lines in a study area may elect to file its access tariffs in accordance with Section 61.39 of the Commission's rules,[21] which the Commission adopted in the *Small Carrier Tariff Order*.[22] A carrier choosing to proceed under this rule (Section 61.39 Carrier) must file access tariffs in odd numbered years to be effective for a two-year period.[23] Section 61.39 Carriers base their initial rates on historical costs (or average schedule settlements) and associated demand for the preceding year.[24] They base their subsequent rates on their costs and traffic volumes for the prior two year period.[25] Section 61.39 Carriers do not pool their costs

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Beehive Telephone, Inc. Nevada, Memorandum Opinion and Order, 17 FCC Rcd 11641, 11644, para. 6 (2002) (*AT&T v. Beehive*).

[12] Joint Statement at 4, Stipulation 8.

[13] Joint Statement at 4, Stipulation 10.

[14] *Id*.

[15] *See* 47 C.F.R. §§ 69.1–69.2.

[16] *See* 47 U.S.C. § 203.

[17] *See Establishing Just and Reasonable Rates for Local Exchange Carriers*, Notice of Proposed Rulemaking, 22 FCC Rcd 17989, 19992–93, paras. 6–8 (2007) (*2007 Access Charge NPRM*); *Investigation of Certain 2007 Annual Access Tariffs*, Order Designating Issues for Investigation, 22 FCC Rcd 16109, 16111–12, paras. 4–6 (Wireline Comp. Bur. 2007). Rate-of-return carriers may earn no more than a Commission-prescribed return on the investments they make in providing exchange access services. *General Communication, Inc. v. Alaska Communications Systems*, Memorandum Opinion & Order, 16 FCC Rcd 2834, 2836, para. 5 (2001), *review granted in part and denied in part and case remanded, ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403 (D.C. Cir. 2002).

[18] *2007 Access Charge NPRM*, 22 FCC Rcd at 17992, para. 6.

[19] *Id*.

[20] *Id*.; 47 C.F.R. §§ 69.601–69.612.

[21] 47 C.F.R. § 61.39.

[22] *Regulation of Small Telephone Companies*, Report and Order, 2 FCC Rcd 3811 (1987) (*Small Carrier Tariff Order*); *2007 Access Charge NPRM*, 22 FCC Rcd at 17992–93, paras. 7–8.

[23] 47 C.F.R. § 69.3(f)(2).

[24] 47 C.F.R. § 61.39(b).

[25] 47 C.F.R. § 61.39(a).

and revenues with any other carrier. Thus, if demand increases, Section 61.39 Carriers retain the revenues to the extent they exceed any cost increases.

9. The Commission considers CLECs (such as Defendants) to be nondominant carriers subject to minimal rate regulation.[26] During the relevant period, CLECs had two means by which to provide and charge IXCs for functionally equivalent interstate access services. A CLEC generally may tariff interstate access charges if the charges are no higher than the rate charged for such services by the competing ILEC (the benchmarking rule).[27] Alternatively, a CLEC must negotiate and enter into agreements with IXCs to charge rates higher than those permitted under the benchmarking rule.[28]

D. The Access Stimulation Scheme

1. Beehive Becomes a Section 61.39 Carrier and Enters Into a Revenue-Sharing Agreement with Joy.

10. Prior to March 31, 1994, Beehive participated in the NECA traffic-sensitive tariff.[29] In 1994, Beehive withdrew from the NECA pool and became a Section 61.39 Carrier.[30] Because Beehive operates in sparsely-populated areas, its historic traffic volumes at that time were low, thereby allowing it to charge relatively high access rates in its individual tariff.[31]

11. Around the same time that Beehive became a Section 61.39 Carrier, Beehive and Joy entered into an access revenue-sharing arrangement in which Beehive paid Joy a portion of Beehive's tariffed access charges for every minute of long distance traffic routed to Joy's assigned telephone numbers.[32] The agreement with Joy resulted in Beehive's interstate local switching minutes of use growing exponentially. For example, between 1994 and 2005, Beehive's traffic increased approximately one hundredfold, from 3.6 million minutes of use in 1994 to 313.5 million minutes of use in 2005.[33]

2. Beehive Reenters the NECA Pool.

12. As a result of the significant increase in traffic, Beehive was required to reduce its end office switching element rate between 2001 and 2005 from 4.59 cents per minute to 1.02 cents per minute.[34] AT&T estimates that Beehive's local switching rate would have declined even further (to 0.25

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[26] *See Tariff Filing Requirements for Non-Dominant Common Carriers*, Memorandum Opinion and Order, 8 FCC Rcd 6752, 6754, para. 9 (1993) (CLECs are non-dominant carriers because they have not been previously declared dominant), *vacated and remanded in part on other grounds*, *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995); *on remand*, 10 FCC Rcd 13653 (1995).

[27] *See* 47 C.F.R. § 61.26; *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9925, para. 3 (2001) (*CLEC Access Reform Order*). In 2011, the Commission adopted rules requiring a CLEC engaged in "access stimulation" (discussed below) to reduce its tariffed interstate switched access rates to the rates of the price cap LEC in the state with the lowest rates, rather than the presumably higher rates of the competing ILEC. *See* 47 C.F.R. § 61.26(g); *USF/ICC Transformation Order*, 26 FCC Rcd at 17874–90.

[28] *CLEC Access Reform Order*, 16 FCC Rcd at 9925, para. 3.

[29] Joint Statement at 6–7, Stipulation 23.

[30] *Id*.

[31] *See Beehive Telephone Company, Inc. Beehive Telephone Company, Inc. Nevada*, Order on Reconsideration, 13 FCC Rcd 11795, 11806, para. 24 (1998) (*Beehive Reconsideration Order*).

[32] Joint Statement at 7, Stipulation 24. This payment arrangement changed over time to a fixed monthly fee. *Id.*

[33] *See* Joint Statement at 7–8, Stipulation 25, 29.

[34] Joint Statement at 8, Stipulation 30. During this same period, the Commission was investigating Beehive's revenue-sharing arrangements, its relationship with Joy, and its high access rates. *See* AT&T Ex. 130, Deposition of Charles McCown at 38–39, 157–59 (McCown First Deposition). *See generally Beehive Telephone Company, Inc.,*

(continued . . .)

cents per minute by 2007), if Beehive continued to be the entity that charged terminating access.[35] In order to avoid these additional rate reductions, however, Beehive reentered the NECA pool in mid-2007.[36] As explained above, participation in the NECA pool tariff meant that Beehive no longer was able to retain for itself—and would have to share with all pool members—revenues in excess of its costs.[37]

3. Beehive Creates Defendants.

13. Rather than dismantling the access stimulation scheme, Beehive set about creating the Defendants to assume its role as terminating access carrier for certain end-users. As noted above, CLECs may tariff switched access services at rates that are "benchmarked" against the competing ILEC's rates.[38] Unlike ILECs, however, during the period relevant to this complaint, CLEC rates were not subject to reduction as a result of large increases in traffic volume.[39] Although Defendants provided the termination services, Beehive continued to charge the IXCs for tandem switching and transport of the stimulated traffic.[40]

14. Beehive directed its consultant—CHR—to assist Defendants in preparing and filing tariffs,[41] and Beehive paid CHR for its work.[42] Similarly, at no cost to All American, Beehive's attorney

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Beehive Telephone, Inc. Nevada, Suspension Order, 12 FCC Rcd 11695 (Com. Car. Bur. 1997) (*Beehive Suspension Order*); *Beehive Telephone Company, Inc., Beehive Telephone, Inc. Nevada*, Memorandum Opinion and Order, 13 FCC Rcd 2736 (1998) (*Beehive First 1997 Rate Investigation Order*); *Beehive 1997 Rate Reconsideration Order*; *Beehive Telephone Company, Inc., Beehive Telephone, Inc. Nevada*, Memorandum Opinion and Order, 13 FCC Rcd 12275 (1998) (*Beehive Second 1997 Rate Investigation Order*).

[35] Joint Statement at 22, para. 46 (AT&T Disputed Fact); Complaint Ex. A, Expert Report of David I. Toof, PhD (Toof Report), at 6, para. 16.

[36] *See* AT&T Ex. 130, McCown First Deposition at 56, 158; Defendants' Ex. 4, Deposition of Charles McCown at 106–07 (McCown Second Deposition); Joint Statement at 9, Stipulation 34.

[37] Moreover, the enormous quantity of terminating minutes that Beehive was receiving by virtue of its arrangement with Joy would have reduced Beehive's per-minute costs, risking the possibility that Beehive would have been forced into a lower NECA rate band. *See, e.g.*, AT&T Legal Analysis at 37–38; AT&T Reply to Formal Complaint, File No. EB-09-MD-010 (filed Jan. 29, 2010) at 15 and n.31 (AT&T Reply); AT&T Ex. A, Toof Report at 4–6, paras. 12–16.

[38] *See* paragraph 9 above.

[39] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17885–86, para. 689; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, Notice of Proposed Rulemaking, 22 FCC Rcd 17989, 18003, para. 34 (2007); *see also* note 27 above.

[40] AT&T Ex. 130, McCown First Deposition at 159; Defendants' Ex. 4, McCown Second Deposition at 120; AT&T Ex. 23, Email from Chuck McCown at Beehive to CHR (explaining that Beehive will bill the IXCs for tandem switched termination, tandem switching, and tandem switched transport along with a portion of the local switching to make it whole).

[41] ChaseCom's Answers to AT&T's Amended First and Second Requests for Interrogatories, File No. EB-09-MD-010, at 4 (filed Aug. 27, 2010) (ChaseCom's Interrogatory Responses); e-Pinnacle Communications, Inc.'s Answers to AT&T's Amended First and Second Requests for Interrogatories, File No. EB-09-MD-010 (filed Aug. 27, 2010) (e-Pinnacle's Interrogatory Responses) at 4; All American's Answers to AT&T's Amended First and Second Requests for Interrogatories, File No. EB-09-MD-010 (filed Aug. 27, 2010) (All American Interrogatory Responses) at 3. *See* AT&T Ex. 138, Deposition of Brian Kofford (Kofford Deposition) at 53; AT&T Ex. 139, Deposition of Herb Levitin, at 64 (Levitin Deposition). *See also* AT&T Ex. 54, Email exchange between CHR and Beehive; AT&T Ex. 55, CHR email; AT&T Ex. 56, CHR Email; AT&T Ex. 57, Email from Beehive to CHR; AT&T Ex. 58, Email from e-Pinnacle to CHR; AT&T Ex. 59, CHR Email; AT&T Ex. 60, Email from e-Pinnacle to CHR; AT&T Ex. 61, Email from e-Pinnacle to CHR.

[42] Joint Statement at 9, Stipulation 31; *see also* AT&T Ex. 52, Email from CHR to Beehive; AT&T Ex. 53, Email from Beehive to All American, e-Pinnacle and ChaseCom; AT&T Ex. 135, Deposition of Kelly Atkinson (Atkinson
(continued . . .)

(who also was an employee and director of Beehive) worked on All American's behalf to obtain regulatory approval for All American to become a CLEC in Utah.[43]

15. Defendants then applied for Certificates of Public Convenience and Necessity (CPCN) to operate as CLECs in Utah, representing to the Utah PSC that they did not intend to operate or provide services in Beehive's territory.[44] Beehive publicly supported and assisted Defendants' efforts in filings it made with the Utah PSC.[45] When the Utah PSC issued Defendants' CPCNs, it expressly precluded them from providing public telecommunications services in "local exchanges of less than 5,000 access lines of incumbent telephone corporations with fewer than 30,000 access lines."[46] In other words, Defendants were not permitted to compete against Beehive or provide service in its service territory.[47] Nonetheless, after obtaining CPCNs from the Utah PSC, Defendants filed interstate switched access tariffs with this Commission that benchmarked their tariffed rates for access services in Utah against Beehive's Utah tariffed rates.[48] All American's Nevada CPCN did not have similar territorial restrictions to its Utah CPCN, and its Nevada interstate tariff benchmarked its rates against Beehive's Nevada tariffed rates.[49]

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Deposition) at 24; AT&T Ex. 128, Deposition of David Goodale (Goodale First Deposition) at 210-12; AT&T Ex. 139, Levitin Deposition at 63; e-Pinnacle's Interrogatory Responses at 4.

[43] AT&T Ex. 128, Goodale First Deposition at 212-16; AT&T Ex. 136, Deposition of David Goodale at 160–61 (Goodale Second Deposition); AT&T Ex. 130, McCown First Deposition at 177-79; Joint Statement at 15, Stipulation 73.

[44] AT&T Ex. 5, *Application of All American Telephone Company, Inc. for a Certificate of Public Convenience and Necessity to Provide Local Exchange Services Within the State of Utah*, Report and Order, para. 3 (March 7, 2007) (All American Utah CPCN); AT&T Ex. 9, *Application of e-Pinnacle Communications, Inc. for a Certificate of Public Convenience and Necessity to Provide Local Exchange Services Within the State of Utah*, Report and Order, para. 2 (Oct. 20, 2004) (e-Pinnacle CPCN); AT&T Ex. 12, *Application of ChaseCom for a Certificate of Public Convenience and Necessity to Provide Local Exchange Services Within the State of Utah*, Report and Order, para. 2 (July 13, 2005) (ChaseCom CPCN).

[45] *See* Joint Statement at 9, Stipulation 37; AT&T Ex. 124, *Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier within the State of Utah*, Order on Application for Review and Rehearing and Request for Reconsideration at 21–23 (July 6, 2010) (Utah PSC Revocation Reconsideration Order); AT&T Ex. 79, All American Utah PSC Hearing Direct Testimony at 5; ChaseCom Interrogatory Responses at 4; e-Pinnacle Interrogatory Responses at 4.

[46] Joint Statement at 2–3, Stipulations 2, 3, 4, 6; *see also* Utah Code Section 54-8b-2.1 (specifying the process for excluding competition within a local exchange with fewer than 5,000 access lines and the obligations that may be imposed on carriers obtaining authorization to provide public telecommunications services to any customer or class of customers who requests service within such exchanges).

[47] Joint Statement at 3, Stipulation 6 ("Each of Beehive's local exchanges in Utah have less than 5,000 access lines, and Beehive serves fewer than 30,000 access lines in Utah."). *See* AT&T Ex. 5, All American Utah CPCN, Exhibit A; AT&T Ex. 9, e-Pinnacle CPCN, Exhibit A; AT&T Ex. 12, ChaseCom CPCN, Exhibit A. Indeed, in response to opposition to its initial CPCN application, which included Beehive's territory, All American revised its application to remove the areas served by Beehive. AT&T Ex. 96, *Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier Within the State of Utah, Public Service Commission of Utah*, Docket No. 08-2469-01, Report and Order at 4–5 (Apr. 26, 2010) (Utah PSC Revocation Order).

[48] As noted above, a CLEC may benchmark its rates to those of a *competing* LEC, but Defendants were not authorized to compete with Beehive in Utah. Joint Statement at 10, Stipulation 45; AT&T Legal Analysis at 13–14; *see also* AT&T Ex. 75, All American F.C.C. Tariff No. 2, Original Pages 89–92 (stating that All American's rates shall be "no higher than the Incumbent Local Exchange Carrier's equivalent rates in whose serving area [All American] is providing service"); AT&T Ex. 29, ChaseCom Tariff No. 1 at Pages 91–94 (stating that ChaseCom's
(continued . . .)

4. Beehive Coordinates Defendants' Operations.

16. In order to position Defendants to step in as LECs, Beehive assisted them with setting up their initial operations.[50] It chose a location for Defendants' equipment that enabled Beehive to maximize the amount of transport mileage that it could charge for the stimulated traffic (which it continued to carry, even though Defendants ostensibly terminated the traffic).[51] At no cost to Defendants, Beehive installed and maintained their equipment (which was collocated in Beehive's facilities),[52] coordinated and managed their billing and collection services,[53] and provided power and other services as needed by Defendants.[54] Moreover, Beehive assigned to Defendants, and allowed them to continue to use at no cost, the telephone numbers that previously had been used for Defendants' conferencing and chat line services.[55] Further, Beehive advised CHR regarding when to file revised tariffs for Defendants after Beehive increased its own rates,[56] advanced money to and acted as a co-lessee of Defendants' equipment,[57] and decided whether Defendants could relocate their equipment.[58]

17. Despite becoming CLECs, none of the Defendants marketed local exchange services to residents or businesses generally in Utah or Nevada.[59] Rather, Defendants designed and engineered their

(. . . continued from previous page)
rates "are in accordance with" Beehive's Tariff); AT&T Ex. 30, e-Pinnacle Tariff No. 1 at Pages 92–95 (stating that e-Pinnacle's rates "are in accordance with" Beehive's Tariff).

[49] AT&T Ex. 5, *Application of All American Telephone Company for Authority to Operate as a Competitive Provider of Telecommunications Services, Providing Resold and Facilities-Based Interexchange and Basic Services within the State of Nevada*, Order (Mar. 5, 2001) (All American Nevada CPCN). AT&T Ex. 28, All American F.C.C. Tariff No. 1, at 89–92. ChaseCom and e-Pinnacle were not authorized to operate as CLECs in Nevada.

[50] Joint Statement at 9, Stipulation 31. *See* ChaseCom's Interrogatory Responses at 4; e-Pinnacle's Interrogatory Responses at 4; All American's Interrogatory Responses at 3; *see also* AT&T Ex. 139, Levitin Deposition at 64.

[51] *See* AT&T Ex. 130, McCown First Deposition at 223–24; AT&T Ex. 138, Kofford Deposition at 77–78.

[52] *See* ChaseCom's Interrogatory Responses at 3–4; e-Pinnacle Interrogatory Responses at 3–4; All American Interrogatory Responses at 3; Defendants' Ex. 4, McCown Second Deposition at 120–21; Joint Statement at 10, 14, Stipulations 47 and 70.

[53] Joint Statement at 9, Stipulation 36. Prior to April 2006, Beehive billed AT&T under Beehive's name for calls that terminated on Defendants' equipment. Beginning April 1, 2006, the bills AT&T received were in Defendants' names. Joint Statement at 12, Stipulations 53 and 55; All American's Interrogatory Responses at 5; ChaseCom's Interrogatory Responses at 3–4; e-Pinnacle's Interrogatory Responses at 4, 6; AT&T Ex. 139, Levitin Deposition at 93–95; AT&T Ex. 138, Kofford Deposition at 68–69. Beehive, however, continued to generate the invoices and collect charges until Defendants ceased operating. *But see* All American Interrogatory Responses at 5 (between June 1, 2006 and August 1, 2007, Beehive resumed billing AT&T under Beehive's name for traffic that terminated to Joy's conference bridge equipment in Utah); *see also* AT&T Ex. 136, Goodale Second Deposition at 52.

[54] *See* Joint Statement at 14, Stipulation 70; ChaseCom's Interrogatory Responses at 4; e-Pinnacle's Interrogatory Responses at 3–4; All American's Interrogatory Responses at 3, 6; AT&T Ex. 130, McCown First Deposition at 162–64; Defendants' Ex. 4, McCown Second Deposition at 120–21; AT&T Ex. 138, Kofford Deposition at 55–58; AT&T Ex. 136, Goodale Second Deposition at 65; AT&T Ex. 139, Levitin Deposition at 54.

[55] Joint Statement at 9, Stipulation 36; All American's Interrogatory Responses at 3, 6; ChaseCom's Interrogatory Responses at 4; e-Pinnacle's Interrogatory Responses at 4; AT&T Ex. 138, Kofford Deposition at 59–60; AT&T Ex. 139, Levitin Deposition at 67–68; AT&T Ex. 136, Goodale Second Deposition at 54–57.

[56] *See, e.g.*, AT&T Ex. 56, CHR Email (noting that Beehive directed CHR to contact Defendants to ask if they wanted their tariffs changed to reflect Beehive's increased rate changes).

[57] e-Pinnacle's Interrogatory Responses at 4–6.

[58] *See, e.g.*, AT&T Ex. 138, Kofford Deposition at 47.

[59] Joint Statement at 13, Stipulations 62, 65. *See also* AT&T Ex. 96, Utah PSC Revocation Order at 14–16, 18, 26–28; AT&T Ex. 139, Levitin Deposition at 84, 123; AT&T Ex. 138, Kofford Deposition at 71, 110.

operations to provide services to CSPs exclusively.[60] Specifically, All American's operations in Nevada and Utah solely supported its affiliate Joy's chat line and conferencing services.[61] All American never had its own operating switch in Nevada,[62] and traffic to telephone numbers associated with its Nevada operations terminated to Joy's equipment located at Beehive's facilities in Utah not in Nevada.[63] Nor did All American have a switch in Utah until one was installed sometime in 2008.[64] That switch, however, was connected to the Internet and was not physically connected to Joy's equipment in Utah.[65] ChaseCom and e-Pinnacle provided conferencing services on their conference bridge equipment.[66] ChaseCom served five CSPs, which included its own conferencing services under its own brand,[67] and e-Pinnacle served four CSPs.[68] The only equipment that ChaseCom and e-Pinnacle owned was conference bridge equipment.[69] They did not own or lease any switches that are typically used to provide competitive LEC services to the public.[70]

[60] Defendants were established as UNE-P CLECs. *See* AT&T Exs. 25, 48, 49; *see also* AT&T Ex. 135, Allison Deposition at 33. They did not, however, obtain any unbundled network elements that would have enabled them independently to provide local telecommunications services to the public. *See, e.g.*, AT&T Ex. 140, Beehive's Response to Sprint's Third Set of Interrogatories and Document Requests at 10; AT&T Ex. 138, Kofford Deposition at 59; AT&T Ex. 139, Levitin Deposition at 66–67.

[61] AT&T Ex. 97, *Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier Within the State of Utah*, Public Service Commission of Utah, Transcript of Hearing, Docket No. 08-2469-01, at 123 (Mar. 3, 2010) (Utah PSC Transcript); AT&T Ex. 100, *Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier Within the State of Utah*, Public Service Commission of Utah, Pre-Filed Rebuttal Testimony of David W. Goodale on Behalf of All American Telephone Company, Inc., at 7 (Feb. 26, 2010).

[62] All American maintains that it purchased a switch for use in Nevada. As of October 27, 2010, however, it had not been installed. AT&T Ex. 132, Deposition of Doug Wingrove at 8, 18-20, 39-40; *see* AT&T Initial Brief at 8–9. The testimony All American cites to the contrary is from individuals who lacked direct knowledge regarding the switch. *See* Defendants' Reply Brief at 6–7; AT&T Ex. 128, Goodale First Deposition at 54; AT&T Ex. 136, Goodale Second Deposition at 49–50, 105; AT&T Ex. 130, McCown First Deposition at 69–70; AT&T Ex. 131, Deposition of John Brewer at 103–04. Consequently, calls in Nevada continued to be routed and terminated in the same manner over Beehive's equipment. AT&T Ex. 132, Deposition of Doug Wingrove at 40–41.

[63] AT&T Ex. 132, Deposition of Doug Wingrove at 11-12, 14-17, 22-26, 33-34 (testifying that Joy's conference bridge equipment was located in Utah and that all calls to telephone numbers associated with Joy's operation were routed to its equipment located in Utah).

[64] All American's assertion that it leased switches from Beehive prior to purchasing and installing its own switches in Nevada or Utah is unsupported. *See* AT&T Ex. 130, McCown First Deposition at 105; AT&T Ex. 97, Utah PSC Transcript at 69; AT&T Ex. 128, Goodale Deposition at 122-24. *See, e.g.*, AT&T Ex. 140, Beehive's Response to Sprint's Third Set of Interrogatories and Document Requests at 10**.**

[65] AT&T Ex. 132, Deposition of Doug Wingrove at 37-38 (testifying that All American's Utah switch was connected to a router, which was then connected to the Internet, and that the switch was not physically connected to any conferencing equipment).

[66] AT&T Ex. 139, Levitin Deposition at 73, 88, 123; AT&T Ex. 138, Kofford Deposition at 71-72.

[67] AT&T Ex. 139, Levitin Deposition at 41-49.

[68] AT&T Ex. 138, Kofford Deposition at 83.

[69] Joint Statement at 9, Stipulation 38; AT&T Ex. 139, Levitin Deposition at 66-67; AT&T Ex. 138, Kofford Deposition at 78-80.

[70] AT&T Ex.139, Levitin Deposition at 66-67; ChaseCom Interrogatory Responses at 6-7. Although e-Pinnacle described its conference bridges as "switches" (AT&T Ex. 138, Kofford Deposition at 58), other evidence in the record contradicts this unsubstantiated claim (such as e-Pinnacle's admission that it did not provide dialtone or telecommunications services). *See* Joint Statement at 13, Stipulation 65; *see also* AT&T Ex. 138, Kofford

(continued . . .)

18. Defendants no longer operate as CLECs in Nevada or Utah. All American ceased operating in Utah and Nevada during the summer of 2010.[71] ChaseCom and e-Pinnacle ceased operating in Utah during the summer of 2007.[72] Although Defendants had Section 214 authorizations from this Commission, they did not comply with the Commission's discontinuation of service rules, which require obtaining approval for and notifying customers of the discontinuation of service.[73]

E. The Utah PSC Revocation Proceeding

19. On April 26, 2010, the Utah PSC revoked All American's CPCN and ordered All American to withdraw from the state.[74] Characterizing All American as a "mere shell company," the Utah PSC found that All American lacked the technical, financial, and managerial resources to serve the customers it represented it would and could serve when applying for its CPCN.[75] All American, the Utah PSC determined, misrepresented its intent to provide all forms of resold local exchange service,[76] when, in fact, it never planned to serve any customers other than Joy.[77] The Utah PSC concluded that All American's maintenance of a CPCN was not in the public interest.[78] Refusing to condone All American's "blatant legal violations,"[79] the Utah PSC explained that All American operated illegally in Utah "for about three years prior to even obtaining its CPCN," that "[i]t operated illegally in Beehive territory while it was applying for a CPCN," and that "[f]rom the date it was granted its CPCN explicitly prohibiting it from entering Beehive territory, it was already operating there illegally" and continued to do so.[80] In other words, All American never intended to—nor did it ever—comply with its Utah authorization.[81]

(. . . continued from previous page)
Deposition at 110. Thus, although Defendants provided some CLEC services, they did not do so to the public at large (nor, as discussed below, did they do so in accordance with the terms of their tariffs).

[71] *See* discussion regarding the Utah PSC revocation proceeding below in paragraphs 19-21. *See also* AT&T Ex. 128, Goodale First Deposition at 48.

[72] *See* AT&T Ex. 138, Deposition of Brian Kofford, at 24-25; AT&T Ex. 139, Deposition of Herb Levitin at 64-65.

[73] *See* 47 C.F.R. § 63.71.

[74] *See* AT&T Ex. 96, *Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier within the State of Utah*, Report and Order (Apr. 26, 2010) (Utah PSC Revocation Order). All American filed with the Utah PSC a petition to amend its CPCN retroactively to March 7, 2007 (the date the CPCN was issued), which would have authorized All American to operate as a CLEC in the area certificated to Beehive. *See* AT&T Ex. 71, *Petition of All American Telephone Co., Inc. for a Nunc Pro Tunc Amendment of its Certificate of Authority to Operate as a Competitive Local Exchange Carrier within the State of Utah*, Report and Order (June 16, 2009) at 2–3, 14, 18–19. The Utah PSC, *sua sponte*, expanded the proceeding to consider whether to rescind All American's CPCN.

[75] AT&T Ex. 96, Utah PSC Revocation Order at 18, 23, 24.

[76] *Id*. at 14, 28.

[77] *Id*. at 14, 27–29.

[78] *Id*. at 25.

[79] *Id*. at 29.

[80] AT&T Ex. 96, Utah PSC Revocation Order at 34 (emphasis omitted); *see also id.* at 28 (despite All American's verified representations in its application for a CPCN, Mr. Goodale admitted that "'from the time [All American] first considered operating in Utah, the company's intent was to operate in Beehive's territory in the manner in which it is currently operating'").

[81] AT&T Ex. 96, Utah PSC Revocation Order at 33.

20. The Revocation Order emphasized the "collusion" between All American and Beehive,[82] which profited from All American's operations,[83] determining that "Beehive was a party to [All American's] scheme and materially aided it in operating illegally."[84] The Utah PSC highlighted the following evidence:

> The record shows Beehive helped [All American] obtain its CPCN improperly and helped it operate illegally. [All American] operated illegally at least two years prior to applying for its CPCN. . . . [All American's] petition in the Original Certificate Proceeding, and subsequent amended petitions, were all prepared and filed by Beehive's former counsel. In those petitions . . . [All American] represented to us that they would not serve in Beehive's territory. We granted the CPCN based on this representation. Despite that affirmation that it would not serve in Beehive territory, Beehive's counsel then drafted the interconnection agreement which it claimed would purportedly allow it to compete in Beehive territory. Beehive knew that [All American] was not authorized to serve in its territory. . . . All the while, Beehive . . . provided management services, consulting services, and serviced equipment belonging to [All American].[85]

"Promot[ing] competition . . . and prevent[ing] anti-competitive behavior," the PSC observed, is what "Beehive and [All American] do *not* want."[86]

21. The Utah PSC concluded that All American's CPCN should be rescinded because it "does not merit" the "concomitant privileges" obtained from a CPCN, including "the right to levy access charges" and "order number blocks."[87] It further ordered All American to cease operating in Utah within 30 days.[88] Although All American sought review and rehearing of the Revocation Order (and Beehive filed a request for reconsideration and vacatur of the Revocation Order), the Utah PSC declined to reverse its findings.[89] It further ordered that All American would be assessed a $2,000 per day penalty for each day it continued operating.[90]

F. The Primary Jurisdiction Referral

22. On February 5, 2007, Defendants sued AT&T in the United States District Court for the Southern District of New York.[91] The federal court complaint, as amended on March 6, 2007, asserted four claims: (i) a collection action for amounts AT&T allegedly owed Defendants for access services

[82] AT&T Ex. 124, Utah PSC Revocation Reconsideration Order at 17.

[83] AT&T Ex. 96, Utah PSC Revocation Order at 26 (All American represented in a post-hearing brief that its operations "provide revenue to Beehive"). As it did when All American was applying for its CPCN, Beehive supported All American in its efforts to dissuade the Utah PSC from revoking All American's CPCN. *See* AT&T Ex. 124, Utah PSC Revocation Reconsideration Order at 1.

[84] AT&T Ex. 124, Utah PSC Revocation Reconsideration Order at 23.

[85] *Id*. at 21-22 (citations omitted).

[86] *Id*. at 19 (emphasis added).

[87] *Id*. at 11.

[88] *Id*. at 35.

[89] AT&T Ex. 124, Utah PSC Revocation Reconsideration Order at 23.

[90] *Id*. at 23.

[91] Joint Statement at 4, Stipulation 11.

provided pursuant to interstate tariffs; (ii) a claim that AT&T violated Section 201(b) of the Act by invoking "self-help" and failing to pay for the tariffed access services; (iii) a claim that AT&T violated Section 203(c) of the Act by failing to pay for the tariffed services; and (iv) a claim for compensation under quantum meruit for the telecommunications services allegedly provided.[92] AT&T filed an answer and counterclaims, asserting federal law claims that Defendants violated Sections 201(b) and 203 of the Act, as well as state law fraud, civil conspiracy, and unjust enrichment claims.[93] Specifically, AT&T alleged that Defendants did not provide "switched access services consistent with the terms of their tariffs."[94] AT&T also claimed that, regardless of whether Defendants provided access services pursuant to tariff, they committed unreasonable practices through "sham" arrangements designed for the purpose of inflating access charges.[95]

23. The First Court Referral Order, issued on March 16, 2009, referred AT&T's "sham entity" counterclaim to the Commission.[96] AT&T effectuated this referral by filing an informal complaint with the Commission on April 15, 2009,[97] which it converted into a formal complaint on November 16, 2009.[98] Thereafter, Defendants requested that the Court refer additional issues to the Commission, which the Court did on February 5, 2010.[99] At Commission staff's direction, AT&T filed an Amended Complaint to effectuate certain issues in the Second Court Referral Order.[100] At the same time, Defendants filed their own formal complaint to effectuate the remaining issues in the Second Court Referral Order,[101] which the Commission has already resolved.[102]

III. DISCUSSION

A. Defendants Violated Section 201(b) of the Act by Operating as Sham CLECs With the Apparent Purpose and Effect of Inflating Their Billed Access Charges to Levels That Could Not Otherwise Be Obtained by Lawful Tariffs.

24. We find, based on the totality of the record, that Defendants were "sham" CLECs created to "capture access revenues that could not otherwise be obtained by lawful tariffs,"[103] and that

[92] *Id*.

[93] Joint Statement at 4–5, Stipulation 12.

[94] *Id*.

[95] *Id*.

[96] AT&T Ex. 1, *All American Telephone Company, Inc. v. AT&T, Inc.*, Memorandum & Order, 07-Civ 861, at *3–4 (WHP) (Mar. 16, 2009) (First Court Referral Order).

[97] AT&T Ex. 34, Informal Complaint, File No. EB-09-MDIC-003 (Apr. 15, 2009).

[98] Complaint at 2, para. 2, n.4. *See* Formal Complaint of AT&T, File No. EB 09-MD-010 (filed Nov. 16, 2009). Count II of AT&T's Complaint implements the First Court Referral Order.

[99] AT&T Ex. 94, *All American Telephone Company, Inc., et al. v. AT&T, Inc.*, Memorandum & Order, 07-Civ 861, at 2–4 (WHP) (Feb. 5, 2010) (Second Court Referral Order). Count I of AT&T's Complaint implements Issues 1a to 1e and Count III effectuates issues 2, 3, 5a, 5c, 5d, and 5e of the Second Court Referral Order.

[100] *See* April 2 Letter Ruling.

[101] Formal Complaint and Motion for Declaratory Ruling of All American Telephone Co., e-Pinnacle Communications, Inc., and ChaseCom, File No. EB-10-MD-003 (filed May 7, 2010).

[102] *See All American v. AT&T Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 723 (2011).

[103] Complaint Legal Analysis at 29–53; AT&T Reply at 14–17; AT&T Reply to Amended Formal Complaint, File No. EB-09-MD-010 (filed July 6, 2010) at 24-28 (AT&T Amended Reply); AT&T Initial Brief at 18–24.

billing AT&T for access charges in furtherance of this scheme constitutes an unjust and unreasonable practice in violation of Section 201(b) of the Act. The extensive record in this case overwhelmingly supports our determination.[104]

25. Defendants had no intention at any point in time to operate as *bona fide* CLECs or provide local exchange service to the public at large.[105] Although they obtained CPCNs, Defendants neither owned nor leased facilities, nor did they purchase unbundled network elements typically used by CLECs to provide any telecommunications services to the public.[106] Defendants' entire business plan was to generate access traffic exclusively to a handful of CSPs,[107] and to bill for that traffic at tariffed rates that were benchmarked to Beehive's NECA rates.[108] Defendants did this even though they represented to the Utah PSC that they would *not* operate as CLECs in Beehive's territory,[109] and their Utah CPCNs specifically prohibited them from doing so.[110] Indeed, All American admits that it knew of the limitation in its Utah CPCN and nonetheless operated in contravention of it.[111] ChaseCom and e-Pinnacle similarly admit that they intended all along to provide service in prohibited Beehive service areas; nonetheless, they turned a blind eye to the limitations of their CPCNs.[112]

26. Beehive masterminded the sham. Although ostensibly "competing" with each other, Beehive and Defendants were in no sense vying for customers.[113] On the contrary, Beehive engaged—at its own expense—consultants and attorneys to assist Defendants in obtaining CPCNs.[114] Beehive then supported Defendants' operations in numerous ways, from directing the installation and maintenance of Defendants' collocated equipment and acting as a co-lessee/guarantor of equipment, to operating

[104] The record exceeds 7,000 pages, including pleadings, discovery responses, deposition transcripts, court exhibits, Utah PSC exhibits, and other miscellaneous documents.

[105] *See* paragraphs 17, 19–21 above.

[106] *See, e.g.*, AT&T Ex. 140, Beehive's Response to Sprint's Third Set of Interrogatories and Document Requests at 10; AT&T Ex. 138, Kofford Deposition at 56, 59; AT&T Ex. 139, Levitin Deposition at 66–67.

[107] All American served Joy, its parent-affiliate CSP. Joint Statement at 8, Stipulation 28; AT&T Ex. 96, Utah Revocation Order at 6. In addition to its own conferencing service, ChaseCom served three CSPs. AT&T Ex. 139, Levitin Deposition at 44–45, 48. e-Pinnacle also served three CSPs. AT&T Ex. 138, Kofford Deposition at 83.

[108] 47 C.F.R. § 61.26.

[109] AT&T Ex. 5, All American Utah CPCN, at 2–3; AT&T Ex. 9, e-Pinnacle CPCN, at para. 3; AT&T Ex. 12, ChaseCom CPCN, at para. 3.

[110] AT&T Ex.6, All American CPCN at Exhibit A; AT&T Ex. 96, Utah PSC Revocation Order, at 29, 33–34; AT&T Ex. 9, e-Pinnacle CPCN at para. 2; AT&T Ex. 12, ChaseCom CPCN at para. 2. We disagree with the CLECs' contention that the status of their CPCNs is irrelevant to whether they operated as sham entities and to their ability to lawfully provide interstate switched access service under the terms of their respective tariffs. *See* Complaint at 16, para. 29; Answer at 15, para. 29; paragraph 39 below.

[111] AT&T Ex.128, Goodale Deposition at 216; AT&T Ex. 96, Utah PSC Revocation Order at 34.

[112] The owners of ChaseCom and e-Pinnacle expressed a complete lack of familiarity with a telecommunications company's operations and were unaware of the limitations in the Utah CPCNs. AT&T Ex. 138, Kofford Deposition at 68; AT&T Ex. 139, Levitin Deposition at 56–58. Beehive similarly disregarded the CPCN limitations, encouraging All American to enter into an interconnection agreement with Beehive. *See* AT&T Ex. 130, McCown First Deposition at 177–82; AT&T Ex. 124, Utah PSC Revocation Reconsideration Order at 21-22.

[113] AT&T Ex. 96, Utah PSC Revocation Order at 6, 27–28; *see, e.g.*, AT&T Ex. 138, Kofford Deposition at 71; AT&T Ex. 139, Levitin Deposition at 88.

[114] *See* paragraphs 13–15, 20 above.

Defendants' billing and collection services, allowing Defendants to use Beehive's telephone numbers for their conferencing and chat line services, and advancing Defendants money.[115]

27. Creation of Defendants allowed the access stimulation arrangements to continue at rates that would have been unsustainable had Beehive remained a Section 61.39 Carrier. Under the Commission's *Small Carrier Tariff Rules*, Beehive's rates declined over time (as its volume of calls to CSPs increased) and would have continued to decline every two years.[116] Beehive, accordingly, re-entered the NECA pool, where its rates increased to between 2.44 cents per minute and 3.30 cents per minute for the local switching rate elements.[117] Beehive, however, was then subject to NECA's requirement that revenues from the stimulated traffic in excess of Beehive's costs be distributed among the pool members. In contrast, Defendants—which are CLECs not subject to NECA's requirements or any other rate-of-return regulation—could "benchmark" their rates to the "competing" ILEC and continue to bill IXCs for interstate switched access pursuant to tariffs. Other than the rates, however, nothing in substance changed when Defendants began "providing" these access services.[118] Callers dialed the same telephone numbers to reach chat or conference lines, and their calls were routed over the same Beehive facilities and equipment.[119] Beehive even continued to generate the access bills—at no cost to Defendants.[120]

28. Beehive still made money. It charged the IXCs for tandem switching and transport of the stimulated traffic, which benefited Beehive "roughly within an order of magnitude" of what had been Beehive's take of the terminating access profits.[121] When asked in deposition what Beehive gained from remaining part of the access stimulation relationship, Beehive's Chief Executive Officer explained:

> All American had a miraculous ability to generate enormous volumes of telephone calls inbound to Beehive. Beehive charged by the minute and by the mile in some cases -- well, almost all cases. Our access billables were huge. *That's what we were getting out of it . . . a lot of money.*[122]

Moreover, it appears that Beehive held for itself a share of the terminating access charges, limiting the CLECs to "a set number of cents per minute" that did not change after Defendants became CLECs.[123]

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[115] *See* paragraph 16 and notes 53 and 55 above; e-Pinnacle's Interrogatory Responses at 4–6; ChaseCom's Interrogatory Responses at 3–4; All American's Interrogatory Responses at 3; AT&T Ex. 130, McCown First Deposition at 126, 174.

[116] Between 2001 and 2005, Beehive's rates for the end office switching rate element of switched access services declined from 4.59 cents per minute to 1.02 cents per minute. Joint Statement at 8, Stipulation 30. AT&T estimates that Beehive's rate would have dropped to as low as 0.25 cents per minute if it had continued filing its own 61.39 tariff. Joint Statement at 22, AT&T Disputed Fact 46; Complaint Ex. A at 6, para. 16.

[117] Joint Statement at 21–22, AT&T's Disputed Fact 45.

[118] *See* Complaint at 30, para. 56, 37–38, para. 66; Complaint Legal Analysis at 5; AT&T Ex. 130, McCown First Deposition at 105; AT&T. Ex.138, Kofford Deposition at 34–37; AT&T Ex. 139, Levitin Deposition at 94–95.

[119] *See* Complaint at 34–35, para. 61; Complaint Legal Analysis at 5; AT&T Ex. 136, Goodale Second Deposition at 40, 54-55; AT&T Ex. 138, Kofford Deposition at 33–36.

[120] *See* Defendants' Ex. 4, McCown Second Deposition at 116-18, 120-21; AT&T Ex. 139, Levitin Deposition at 36, 94; AT&T Ex. 138, Kofford Deposition at 34–35.

[121] AT&T Ex. 130, McCown First Deposition at 159.

[122] AT&T Ex. 130, McCown First Deposition at 87 (emphasis added).

[123] AT&T Ex. 138, Kofford Deposition at 36–37 (testifying that, although e-Pinnacle was nominally the CLEC billing AT&T, it continued sharing revenue with Beehive in exactly the same way it had when Beehive was billing

(continued . . .)

29. Defendants contend that AT&T's sham entity claim lacks both legal and factual support. First, according to Defendants, conduct is unreasonable under Section 201(b) of the Act only if it was taken to further a goal that is prohibited by the Act or the Commission's rules or policies.[124] AT&T, Defendants say, has failed to meet its burden of proving that their conduct violated any Commission rule or any provision of the Act.[125] The Commission's authority to determine whether a carrier's conduct violates Section 201(b), however, is not limited in the manner Defendants suggest. For example, in lieu of directly regulating CLEC access rates, the Commission has stated repeatedly that it will ensure just and reasonable rates through the Section 208 complaint process.[126] Moreover, the Commission has awarded damages (or permitted the complainant to seek damages) under Section 208 for violations of Section 201(b), even where no independent violation of a particular rule was found.[127]

30. Defendants further maintain that AT&T's "sham entity" claim is premised upon a single Commission order—*Total Telecom*[128]—that cannot be squared with the facts in this case and does not

(. . . continued from previous page)
AT&T); *see also* AT&T Ex. 139, Levitin Deposition at 30 (testifying that, after becoming a CLEC, ChaseCom and Beehive would share revenue).

[124] Defendants' Reply Brief at 8 (citing *Global Crossing Telecommunications Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45, 53 (2007) (*Global Crossing v. Metrophones*); *see* 47 U.S.C. § 201(b) ("All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust and unreasonable is hereby declared to be unlawful . . . .")).

[125] Defendants' Reply Brief at 8.

[126] *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, 12 FCC Rcd 15982, 16141, para. 363 (1997) ("[I]f an access provider's service offerings violate section 201 or section 202 of the Act, we can address any issue of unlawful rates through the exercise of our authority to investigate and adjudicate complaints under section 208."); *Hyperion Telecommunications, Inc. Petition for Forbearance*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596, 8597, para. 2, 8609, para. 25 (1997) (same).

[127] *See, e.g.*, *AT&T Corp. v. YMax Communications Corp*., Memorandum Opinion & Order, 26 FCC Rcd 5742, 5761, paras. 52–53 & n.147 (2011) (concluding that Commission's finding that carrier charges were unlawful under Sections 203(c) and 201(b) obviated the need to reach claims stated in remaining counts of complaint alleging violations of particular Commission rules and orders); *AT&T v. Business Telecom Inc.*, Order on Reconsideration, 16 FCC Rcd 21750, 21755, para. 9 (2001) (noting that "the Commission has on several occasions awarded damages for violations of section 201(b), even in the absence of specific rules applicable to the conduct at issue"); *Total Telecomms. Servs., Inc. v. AT&T Corp.*, Memorandum Opinion & Order, 16 FCC Rcd 5726, 5733, para. 16 (2001) (holding that creation of sham entity designed to extract inflated access charges from interexchange carriers violated Section 201(b) despite absence of Commission rule directly on point); *Ascom v. Sprint*, Memorandum Opinion and Order, 15 FCC Rcd 3223 (2000) (holding that a carrier's failure to properly provide service to its customer and for bills issued to a non-customer were unjust and unreasonable practices); *ASC Telecom, Inc. d/b/a AlternaTel*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 18654, 18656 n.18 (2002) (noting that even though a Commission rule did not apply to non-operator service calls, the practice of charging a called party for a rejected collect call nevertheless constitutes a 201(b) violation); *People's Network Inc. v. AT&T*, Memorandum Opinion & Order, 12 FCC Rcd 21081, 21089, para. 17 (Com. Car. Bur. 2007) (holding that carrier's billing delays constituted an unreasonable practice under section 201(b) notwithstanding absence of Commission rule addressing the issue); *Rainbow v. Bell Atlantic*, Memorandum Opinion and Order, 15 FCC Rcd 11754 (CCB 2000) (holding that a carrier's failure to make necessary software available to a customer to access the carrier's platform was an unjust and unreasonable practice); *Hi-Rim Communications, Inc. v. MCI Telecommunications Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 6551 (Com. Car. Bur. 1998) (holding that a carrier's change of customer's designated primary interexchange carrier without authorization, and subsequent failure to transfer the customer back to the original carrier's network was an unjust and unreasonable practice).

[128] *Total Telecommunications Services, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5726 (2001) (*Total Telecom*) *aff'd in part and remanded in part*, 317 F.3d 227 (D.C. Cir. 2003).

support AT&T's claim.[129] In *Total Telecom*, the Commission found that an entity formed by a LEC solely to enable the LEC to charge, indirectly, rates that it could not continue to charge via its existing tariff "deserved to be treated as a sham."[130] AT&T filed a complaint challenging the lawfulness of the sham entity's charges, which the Commission granted, holding that "if accepted . . . [Total's position] would enable every ILEC to avoid dominant carrier regulation by mere artifice."[131] Defendants in this case argue that *Total Telecom* involved a different regulatory scheme that the Commission since has eliminated, rendering the decision irrelevant.[132] They assert that CLECs now must charge the same rate as the competing ILEC,[133] and that AT&T's claim fails because there is no dispute that Defendants' access charges accurately reflect Beehive's tariffed rates.[134] We disagree. *Total Telecom* was not dependent upon the regulatory scheme then in place, but rather upon an analysis of Total Telecom's actions to avoid the regulations necessary to ensure just and reasonable rates.[135] The decision thus not only remains relevant precedent; it supports our conclusion here. But for the creation of Defendants, Beehive's scheme would have ended because, under the Commission's rules, Beehive itself no longer could charge high rates and retain the resultant revenue.[136]

31. Defendants' assertion that their billings to AT&T were lawful because they benchmarked their rates in compliance with Section 61.26(b)(1)[137] of the Commission's rules is irrelevant.[138] Even assuming that Defendants were authorized to compete against Beehive and that Beehive is the "competing" ILEC under the Commission's rules,[139] Defendants were not competing with Beehive in any real sense. On the contrary, Beehive and Defendants collaborated with each other at every turn. As discussed above, we find that Defendants' conduct violates Section 201(b) because they operated as sham entities in an effort to circumvent the Commission's CLEC access charge and tariff rules, which would have brought the access stimulation scheme to an end.

32. Next, Defendants contend that the Commission categorically rejected AT&T's similar challenges to revenue-sharing arrangements between LECs and CSPs, including a complaint AT&T filed against Beehive that "feature[ed] Joy extensively."[140] We disagree. In *Jefferson Telephone*, the Commission "emphasize[d] the narrowness of [its] holding" and found "simply that, based on the specific

[129] Answer Legal Analysis at 16–19.

[130] *Total Telecom*, 16 FCC Rcd at 5734, para. 18.

[131] *AT&T Corporation v. FCC*, 317 F.3d 227, 233 (D.C. Cir. 2003).

[132] Answer Legal Analysis at 17.

[133] Answer Legal Analysis at 18.

[134] Answer Legal Analysis at 16–18; Defendants' Initial Brief at 19–20; Surrebuttal of All American, e-Pinnacle, and ChaseCom, File No. EB-09-MD-010, at 5–6 (filed Aug. 4, 2010) (Surrebuttal).

[135] *See Total Telecom*, 16 FCC Rcd at 5733, para. 16 ("Atlas created Total as a sham entity designed solely to extract inflated access charges from IXCs, [and] this artifice constitutes an unreasonable practice in connection with the provision of access services.").

[136] Nor do we find persuasive Defendants' reliance on a settlement agreement between AT&T and Beehive, which involved a claim pre-dating the period at issue here. *See* Defendants' Initial Brief at 21–22.

[137] 47 C.F.R. § 61.26(b)(1).

[138] Answer Legal Analysis at 19-20, 41-44, Defendants' Initial Brief at 20–21.

[139] A "competing ILEC" is the "incumbent local exchange carrier . . . that would provide interstate exchange access service . . . to the extent that those services would not be provided by the [Defendants]." 47 C.F.R. § 61.26(a)(2).

[140] Answer Legal Analysis at 15 (citing *AT&T Corporation v. Jefferson Telephone Company*, 16 FCC Rcd 16130 (2001) (*Jefferson Telephone*); *AT&T Corp. v. Frontier Communications of Mt. Pulaski, Inc.*, 17 FCC Rcd 4041 (2002) (relying upon *Jefferson Telephone* and deciding issues identical to those in that case and reaching the same conclusion); *AT&T Corporation v. Beehive Telephone Company, Inc.*, 17 FCC Rcd 11641 (2002) (same)).

facts and arguments presented," AT&T failed to demonstrate that Jefferson's revenue-sharing agreement violated the Act.[141] The Commission "expresse[d] no view on whether a different record could have demonstrated that the revenue-sharing agreement at issue in this complaint (or other revenue-sharing agreements between LECs and end user customers) ran afoul of sections 201(b), 202(a), or other statutory or regulatory requirements."[142] Because the facts and claims in *Jefferson Telephone* are different from those of this case, it is not determinative of AT&T's sham entity claim.

33. Finally, Defendants argue that AT&T actually is attacking Beehive's rates.[143] Although, unquestionably, Beehive is integral to this regulatory arbitrage, Defendants miss the point. The gravamen of the Complaint is that Defendants violated Section 201(b) of the Act by operating as sham entities for the purpose of inflating access charges that AT&T and other IXCs had to pay.[144] And so it is *Defendants' conduct*, not Beehive's rates, that is at issue.[145] Upon reviewing the extensive record (developed here, in the Court, and at the Utah PSC), we have little difficulty concluding—as AT&T alleges—that Defendants engaged in an unjust and unreasonable practice. We therefore grant Count II of AT&T's Complaint.

B. Defendants Violated Sections 201(b) and 203 of the Act by Billing for Services that They Did Not Provide Pursuant to Valid and Applicable Tariffs.

34. In addition to operating as sham CLECs in violation of Section 201(b) of the Act, we find that Defendants violated Sections 203 and 201(b) of the Act by billing AT&T for access services that they did not provide pursuant to valid and applicable interstate tariffs.[146] Accordingly, we grant Count I of AT&T's Complaint as well.

1. None of the Defendants Had Valid and Applicable Interstate Tariffs for the Traffic Billed to AT&T.

35. All American's F.C.C. Tariff No. 1 (the Nevada Tariff)[147] specifically applied to interstate exchange access services used to send traffic to or from an end user in *Nevada*.[148] All American's Nevada traffic, however, terminated at its affiliate Joy's equipment located in Beehive's

[141] Unlike here, in *Jefferson Telephone* AT&T argued that Jefferson's revenue sharing agreement was inconsistent with a common carrier's duty to carry traffic indifferently in violation of section 201(b) and that the agreement violated Section 202(a)'s restriction on "undue or unreasonable preferences." *Jefferson Telephone*, 16 FCC Rcd at 16137, para. 16.

[142] *Id.*

[143] Answer Legal Analysis at 13–16, 62–63; Defendants' Reply Brief at 8–9.

[144] AT&T Amended Reply at 25–26.

[145] Joint Statement at 9, Stipulation 35.

[146] *See* Complaint at 42–63, paras. 73-113; Complaint Legal Analysis at 9-29; AT&T Initial Brief at 5–8.

[147] All American filed F.C.C. Tariff No. 1 on June 29, 2005, and revised the tariff on June 16, 2008. Joint Statement at 10, Stipulations 40, 42.

[148] *See* AT&T Ex. 28, Tariff No. 1, Original Title Page ("Regulations Rates and Charges Applying . . . Within the Operating Territory of [All American] in the State of Nevada"); Application of Tariff, section 1.1 ("This tariff sets forth the regulations, rates, and charges . . . within . . . Nevada"); Scope, section 2.11 ("Service(s) and the furnishing of interstate transmission of information originating and terminating in . . . Nevada"). Prior to filing Tariff No. 1, All American made modifications *specifying* that the tariff was limited to services provided within Nevada. *See* AT&T Ex. 73 (email from All American to Beehive changing reference from Texas to Nevada); *see also* AT&T Ex. 134, Deposition of Dorothy Young at 29–30 (Young Deposition); AT&T Ex. 97, Utah PSC Hearing Transcript at 85-86. In addition, when All American filed its Tariff No. 2 to cover services provided in states other than Nevada, it made it clear that it did not want its Tariff No. 2 to affect its Nevada operations and tariff. *See* AT&T Ex. 134, Young Deposition at 71–79; AT&T Ex. 74 (email from CHR noting that All American's first tariff was for its Nevada operations).

facilities in Utah and not in Nevada.[149] By billing under that tariff for interstate traffic terminated in Utah, Defendants violated Sections 201(b) and 203 of the Act.

36. All American's F.C.C. Tariff No. 2, ChaseCom's F.C.C. Tariff No. 1, and e-Pinnacle's F.C.C. Tariff No. 1 (collectively, Utah Tariffs)[150] also do not support billing for the Utah traffic because the Utah PSC did not authorize Defendants to provide local telecommunications services in the areas of Utah where they operated. ChaseCom's and e-Pinnacle's tariffs apply to services provided within their "Operating Territory" "in the State of Utah,"[151] and All American's Tariff No. 2 applies to services provided "[w]ithin the Operating Territory of All American."[152] Under the terms of the Tariffs, "Operating Territory" plainly refers to the geographic area where the Utah PSC authorized Defendants to provide local telecommunications services.[153] All of the bills to AT&T for Utah traffic related to services Defendants provided in geographic areas of Utah where they *were not authorized* by the Utah PSC to provide services (i.e., in Beehive's territory).[154] Thus, billing under the Utah Tariffs also violates Sections 201(b) and 203 of the Act.

37. None of Defendants' arguments persuade us otherwise. Defendants incorrectly assert that their authorization under Section 214 of the Act conveys the unfettered ability to provide interstate services nationwide, regardless of limitations in any applicable tariffs.[155] CLECs have blanket Section 214 authority under Section 63.01 of our rules to provide domestic, interstate communications services,[156] but the blanket authority extends only to entry certification requirements for initial operating authority; it does not impact CLECs' obligations under any other section of the Act[157] or Commission rules.[158]

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[149] *See* paragraph 17 and note 63 above.

[150] ChaseCom and e-Pinnacle filed their tariffs—both captioned F.C.C. Tariff No. 1—on October 12, 2005. Joint Statement at 10, Stipulations 43-44. All American filed its F.C.C. Tariff No. 2 on April 18, 2008. Joint Statement at 10, Stipulation 41.

[151] AT&T Ex. 29, e-Pinnacle Tariff No. 1, Original Title Page; AT&T Ex. 30, ChaseCom Tariff No. 1, Original Title Page.

[152] AT&T Ex. 75, All American Tariff No. 2, Original Title Page.

[153] *See* AT&T Ex. 75, All American Tariff No. 2, Original Page 11, Access; Original Page 12, Exchange; AT&T Ex. 29, e-Pinnacle Tariff No. 1, Original Page 11, Access; Original Page 12, Exchange; AT&T Ex. 30, ChaseCom Tariff No. 1, Original Page 10, Access; Original Page 11, Exchange. Even if we found the term "Operating Territory" ambiguous, we would construe it against the drafter and conclude that it refers to the geographic area in which Defendants were authorized by the Utah PSC to provide services. *See AT&T Corp. v. Ymax Communications Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 5742, 5755, para. 33 (2011) (citing *Associated Press v. FCC*, 452 F.2d 1290, 1299 (D.C. Cir. 1971); *Qwest Commc'ns Corp. v. Farmers & Merchants Mut. Tel. Co.*, Memorandum Opinion and Order, 24 FCC Rcd 14801, 14810, n.83 (2009), *recon. denied*, 25 FCC Rcd 3422 (2010), *pet. for review denied, Farmers & Merchants Mut. Tel. Co. v. FCC*, 668 F.3d 714 (D.C. Cir. 2011); *American Satellite Corp. v. MCI Telecommunications Corp.*, Memorandum Opinion and Order, 57 FCC2d 1165, 1167, para. 6 (1976)).

[154] *See* Joint Statement at 12, Stipulation 57 and paragraph 15 and footnotes 44 and 46 above. The Utah PSC concluded that "[a]t no time while it operated in Utah has [All American] operated legally." AT&T Ex. 96, *Utah PSC Revocation Order* at 34.

[155] Answer at 32; Answer Legal Analysis at 22-23; Defendants' Reply Brief at 2.

[156] 47 C.F.R. § 63.01.

[157] *See* 47 U.S.C. § 203 (no carrier shall provide service unless it files and publishes schedules in accordance with the Act and the Commission's regulations).

[158] *Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996*; CC Docket No. 97-11, *Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, AAD File No. 98-43, Report and Order in CC Docket No. 97-11 and Second Memorandum Opinion and Order in AAD File No. 98-43, 14 FCC Rcd 11364, 11372-75, paras. 12-18 (1999). Defendants' reliance upon *Vonage Holdings Corporation*, *Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and

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Accordingly, until a CLEC files valid interstate tariffs under Section 203 of the Act or enters into contracts with IXCs for the access services it intends to provide,[159] it lacks authority to bill for those services. In addition, Defendants' assertion that the geographic scope of their tariffs is merely "illustrative" and "not binding if the carrier actually provides the service in territory not identified in its interstate tariff"[160] is inconsistent with Section 203 and the "filed tariff" doctrine.[161] Finally, contrary to Defendants' characterization, the geographic limitations in their tariffs were not mere "technical defects" or "ministerial errors."[162] Rather, they are terms fundamental to whether the access tariffs apply at all. Defendants have offered no justification for deviating from Section 203 and the filed tariff doctrine, and they may not simply pick and choose the provisions of their Tariffs with which they will comply.[163]

2. Defendants Did Not Terminate Calls to "End Users" Within the Meaning of Their Interstate Switched Access Tariffs.

38. Similarly, we conclude that Defendants also did not terminate calls to "end users" within the meaning of their tariffs. The definition of Switched Access Service in all of the relevant tariffs requires calls to originate from or terminate to "end users" on Defendants' networks.[164] The tariffs define "end users" as "[u]sers of local telecommunications carriers services who are not carriers."[165] As demonstrated above, however, Defendants were sham entities that did not provide local telecommunications services or terminate calls to any "user" of local telecommunications services.[166] In addition, Defendants concede that (1) they have no written agreements for local services with any customers, and did not provide local services to any customers pursuant to tariffs;[167] (2) the CSPs to which they provided service never ordered local telecommunications service from Defendants and

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Order, 19 FCC Rcd 22404 (2004) (*Vonage Declaratory Ruling*) is misplaced. Answer Legal Analysis at 23; Defendants' Reply Brief at 2. The *Vonage Declaratory Ruling* addressed a state commission's attempt to regulate VoIP interstate services. In this case, it is the Utah Tariffs—not any determination by the Utah PSC—which limit Defendants' ability to provide the services in question.

[159] *See CLEC Access Reform Order*, 16 FCC Rcd at 9923, 9925, para. 3; 47 C.F.R. § 61.26.

[160] Answer Legal Analysis at 22–23.

[161] *See MCI WorldCom Network Servs. v. PaeTec Commc'ns, Inc*, 204 Fed Appx 272, n.2 (4th Cir. 2006) ("under the filed rate doctrine, a carrier is expressly prohibited from collecting charges for services that are not described in its tariff").

[162] Answer Legal Analysis at 22-23; Defendants' Reply Brief at 2–4 (citing *Norwest Transportation. Inc. v. Horn's Poultry, Inc.*, 23 F.3d 1151 (7th Cir. 1994) (holding that shipper's tariffed charges were not invalid because shipper failed to change its name on tariff after the ICC approved the name change)).

[163] *See* Complaint Legal Analysis at 10–12, 16.

[164] AT&T Ex. 75, All American Tariff No. 2, Section 6.1 at Original Page 67; AT&T Ex. 30, ChaseCom Tariff No. 1, Section 6.1 at Original Page 70; AT&T Ex. 29, e-Pinnacle Tariff No. 1, Section 6.1 at Original Page 71 (stating that Switched Access Services provides for "the use of common switching, terminating, and trunking facilities between a Customer Designated Premises and an end-users premises for originating and terminating traffic").

[165] AT&T Ex. 75, All American Tariff No. 2 at Original Page 11; AT&T Ex. 30, ChaseCom Tariff No. 1 at Original Page 11; AT&T Ex. 29, e-Pinnacle Tariff No. 1 at Original Page 12.

[166] *See* paragraphs 24–33 above; AT&T Ex. 96, *Utah PSC Revocation Order* at 13–16.

[167] Joint Statement at 13, Stipulations 59-61, 71; AT&T Ex. 141, Letter dated March 8, 2010, from Jonathan E. Canis, Counsel for All American, to The Honorable Henry A. Waxman, Chairman, Committee on Energy and Commerce, House of Representatives at 5 (stating that All American's sole customer "does not take services pursuant to tariff," but rather "per a unique, oral agreement") (All American Congressional Responses). There also is no evidence that Defendants filed tariffs with the appropriate state regulatory authority to provide local telecommunications services. *See, e.g.*, Ex. 96, *Utah PSC Revocation Order* at 23–25 (All American operated "without a local exchange tariff filed in Utah – in violation of Utah [law]").

Defendants never entered the CSPs into their accounting, billing or ordering systems;[168] (3) Defendants never billed the CSPs any amounts for local telecommunications services or any charges for any subscriber line charge, universal service fee, or carrier common line charge; and (4) the CSPs never paid any such amounts.[169] Consequently, Defendants did not have any "end users" as defined in their tariffs, and therefore could not properly bill for access services under the terms of their tariffs.[170]

39. We disagree with Defendants' contention that the Utah PSC's findings are irrelevant to our analysis.[171] The Utah PSC conducted extensive proceedings into All American's operations, and its findings are credible and independently supported by the record. Nor do we find any factual basis for concluding that All American's Nevada operations or ChaseCom's and e-Pinnacle's Utah operations differed in any material respect from All American's Utah operations.

40. Further, there is no merit to Defendants' assertion that *Farmers*[172] has no bearing on this case because the tariff in that case defined "end users" in terms of "subscribers" of services, while Defendants' tariffs define "end users" as "users of local telecommunications services."[173] Even if, as Defendants contend, "user" is a broader term than "subscriber,"[174] the CSPs were not "users of local telecommunications services" provided by Defendants, as would be required under the tariffs.[175]

41. Finally, we disagree that All American's revisions to its Tariff No. 1 somehow obviate the "end user" requirement.[176] All American's Tariff No. 1 applied to interstate traffic terminated in Nevada, not Utah, and the revisions did nothing to alter that fact.[177] And even if revised Tariff No. 1 applied to both Nevada and Utah, it defines "end user" as "[a]ny . . . entity . . . which uses the service of [All American] under the terms and conditions of *this tariff*."[178] Because, as All American admits, its only customer did not use its services under the terms and conditions of any Tariff,[179] All American had no "end users" of its services, as defined in its Revised Tariff No. 1.[180]

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[168] Joint Statement at 13, Stipulations 63–64.

[169] Joint Statement at 13–14, Stipulations 67–68.

[170] *See, e.g.*, *Qwest Communications Corporation v. Farmers and Merchants Mutual Telephone Company*, Second Order on Reconsideration, 24 FCC Rcd 14801, 14805–08, paras. 10–16 (2009).

[171] Answer Legal Analysis at 23–24.

[172] *See Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Company*, Third Order on Reconsideration, 25 FCC Rcd 3422 (2010) (*Farmers*), *review denied*, *Farmers and Merchants Mutual Telephone Company v. FCC*, 668 F.3d 714 (D.C. Cir. 2011) (*Farmers v. FCC*); *see also* Answer Legal Analysis at 25–28.

[173] Answer Legal Analysis at 26–28.

[174] Answer Legal Analysis at 26.

[175] Moreover, contrary to Defendants' characterization, Answer Legal Analysis at 27, *Farmers* was not "premised entirely on the Commission's finding that Farmers acted improperly by back-billing its conference operators." *See Farmers v. FCC*, 668 F.3d at 719–21 (describing the multiple factors the Commission considered in its analysis).

[176] Answer Legal Analysis at 26, n.46.

[177] *See* paragraph 35 above. *See also* AT&T Ex. 77, Letter from Katherine Marshall, Counsel for All American, to Marlene Dortch, FCC Secretary (filing All American Revised F.C.C. Tariff No. 1); AT&T Exhibit 77, Tariff Check Sheet and First Revised Page No. 1 (noting that the Original Title Page and sections 1 and 2 were not revised).

[178] AT&T Ex. 77, Revised Tariff No. 1, First Revised Page No. 12 (emphasis added). *See* AT&T Legal Analysis at 24–25.

[179] AT&T Ex. 141, All American Congressional Responses at 5 (stating that All American's sole customer "does not take services pursuant to tariff," but rather "per a unique, oral agreement"); AT&T Ex. 36, All American's Second Interrogatory Responses at 3 (stating that services provided to its sole customer "were provided on an untariffed basis"); AT&T Ex. 98, All American Answers to Data Requests at 5.3 ("Charges to [All American's only

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C. Defendants' Procedural Arguments Are Baseless.

42. Defendants complain that they were "irreparably prejudiced" by "flawed" decisions relating to the effectuation of the Court Referrals and management of the complaint proceeding.[181] Defendants previously requested reconsideration of rulings relating to the manner in which the Commission chose to hear the issues referred by the Court,[182] which staff denied.[183] Thereafter, Defendants sought permission to file a surrebuttal to AT&T's Reply, arguing that such a filing would "cure" any prejudice.[184] Staff granted their request.[185] Later, Defendants sought reconsideration of several rulings made by staff during a discovery/status conference,[186] which staff denied.[187]

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customer] are not governed by a price list or tariff; but rather pursuant to an oral agreement between the parties"); AT&T Ex. 99, All American Answers to Data Requests at 2 ("All American's business relationship with [its only customer] is governed by an oral agreement").

[180] Because we find that Defendants did not terminate calls to "end users" within the meaning of their tariffs, we need not address AT&T's arguments that the calls were not terminated to "end user premises" or over the Defendants' common facilities. *See* Complaint at 59–61, paras. 106–09; Complaint Legal Analysis at 25–27; AT&T Initial Brief at 15–17. Moreover, having found that Defendants did not bill pursuant to applicable tariffs and that they did not, in any event, provide access services within the meaning of their tariffs, we do not need to address whether Defendants' tariffs also violate the Commission's rules requiring tariffs to clearly establish a rate. *See* Complaint at 45–47, paras. 79–80, nn.162, 165; Complaint Legal Analysis at 13-15; AT&T Initial Brief at 6–8; AT&T Reply Brief at 6–7. For the same reasons, we also need not address whether All American's multiple tariff filings violate the Commission rules. *See* Complaint at 44–47, paras. 78–80; AT&T Legal Analysis at 40.

[181] *See* Answer Legal Analysis at 2–9, 64–66; Defendants' Initial Brief at 1–18.

[182] *See* Letter from Jonathan Canis, Counsel for All American, to Lisa B. Griffin, Deputy Division Chief, EB/MDRD and Anthony J. DeLaurentis, Special Counsel, EB/MDRD, File No. EB-09-MD-010 (filed Apr. 13, 2010).

[183] Letter from Lisa B. Griffin, Deputy Division Chief, EB/MDRD to Jonathan Canis, Counsel for All American, and James F. Bendernagel, Jr., Counsel for AT&T, File No. EB-09-MD-010 (filed Apr. 27, 2010) (April 27th Letter Ruling) (concluding that "relevant factors of law, policy, and practicality" supported the procedural rulings). Defendants subsequently requested that the Commission issue a declaratory ruling, at the same time that it issues its liability ruling in this case, to address several issues referred by the Court (*see* footnote 4 above) that have been bifurcated into any supplemental damages proceeding that may be filed after the liability ruling. Letter from Jonathan E. Canis, Counsel for Defendants, to Lisa B. Griffin, FCC, EB, Deputy Chief of MDRD, Rosemary McEnery, FCC, EB, Deputy Chief of MDRD, Anthony J. DeLaurentis, FCC, EB, Special Counsel, File No. EB-09-MD-010 (filed Mar. 15, 2012). We deny Defendants' request for the reasons explained below in paragraph 43. *See also* 5 U.S.C. § 554(e) (An agency "in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."); 47 U.S.C. § 154(j) ("The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice").

[184] *See* Answer Legal Analysis at 2-9, 64; All American, e-Pinnacle, and ChaseCom's Motion Requesting Permission to File Surrebuttal, File No. EB-09-MD-010 (filed July 14, 2010) at 2–4; *see also* Surrebuttal at 1.

[185] Letter from Lisa B. Griffin, Deputy Division Chief, EB/MDRD to Jonathan Canis, Counsel for All American, and James F. Bendernagel, Jr., Counsel for AT&T, File No. EB-09-MD-010 (filed July 28, 2010) (July 28th Status Conference Order).

[186] Letter from Jonathan Canis, Counsel for All American, to Lisa B. Griffin, Deputy Division Chief, EB/MDRD and Anthony J. DeLaurentis, Special Counsel, EB/MDRD, File No. EB-09-MD-010 (filed Aug. 19, 2010).

[187] Letter from Lisa B. Griffin, Deputy Division Chief, EB/MDRD to Jonathan Canis, Counsel for All American, and James F. Bendernagel, Jr., Counsel for AT&T, File No. EB-09-MD-010 (filed Sept. 2, 2010) (September 2nd Letter Ruling); *see* Opposition of AT&T Corp. to Request for Reconsideration, File No. EB-09-MD-010 (filed Aug. 27, 2010).

43. The Commission has broad discretion to structure its proceedings to maximize fairness, promote efficiency, and conserve the resources of the parties and the Commission.[188] Defendants offer no new arguments as to why the Commission should revisit any of these matters. In any event, we find that the procedural rulings in the case were well-reasoned and appropriate,[189] and that Defendants have suffered no prejudice as a result.[190]

IV. ORDERING CLAUSES

44. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 203, 206, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 206, 208, that Counts I and II of the Complaint are GRANTED.

45. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 203, 206, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 206, 208, that Count III will be addressed in connection with any damages complaint filed by AT&T.

46. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 203, 206, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 206, 208, and the Commission's rules 1.720–1.736, 47 C.F.R. §§ 1.720–1.736, that Defendants' Request for Declaratory Ruling is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[188] *See* 47 U.S.C. §§ 4(i), 4(j), 208 ("[I]t shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."); *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22501, para. 5 (1997) (*Formal Complaints Order*) ("Commission staff retains considerable discretion under the new rules to, and is indeed encouraged to, explore and use alternative approaches to complaint adjudication designed to ensure the prompt discovery of relevant information and the full and fair resolution of disputes in the most expeditious manner possible."); *id.* at 22510, n.68 ("We emphasize again that the staff retains considerable discretion to use alternative approaches and techniques designed to promote fair and expeditious resolution of complaints."); *Public Notice: Primary Jurisdiction Referrals Involving Common Carriers*, 15 FCC Rcd 22449 (Com. Car. Bur., Enf. Bur., Int'l Bur., Wir. Tele. Bur. 2000) ("The procedures by which the Commission handles a common carrier matter referred by a court pursuant to the primary jurisdiction doctrine may vary according to the nature of the matter referred.").

[189] *See* April 27th Letter Ruling (concluding among other things that "relevant factors or law, policy, and practicality" supported the procedural rulings).

[190] *See* April 27th Letter Ruling; July 28th Status Conference Order; September 2nd Letter Ruling. This applies as well to Defendants' mistaken assertion that they have been prejudiced by any purported failure of the Commission to resolve this case within five months. Answer Legal Analysis at 64–66, Defendants' Initial Brief at 10–13; *see Farmers v. FCC*, 668 F.3d at 718 ("But even if the Commission had missed the 90-day deadline, it would not have lost jurisdiction to issue *Farmers II* because Congress established no consequence for failing to meet that deadline.").

EXHIBIT 33

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of	)	
	)	
AT&T Corp.,	)	
Complainant,	)	EB-01-MD-001
v.	)	
	)	
Business Telecom, Inc.,	)	
Defendant.	)	
	)	
	)	
Sprint Communications Company, L.P.,	)	
Complainant,	)	
	)	EB-01-MD-002
v.	)	
	)	
Business Telecom, Inc.,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 25, 2001 **Released:** May 30, 2001

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a separate statement.

TABLE OF CONTENTS **Paragraph**

I. INTRODUCTION

1. In this Order, we grant in part and deny in part complaints filed by AT&T Corp. ("AT&T") and Sprint Communications Company, L.P. ("Sprint") (collectively "Complainants") against Business Telecom, Inc. ("BTI")[1] pursuant to section 208 of the Communications Act of 1934, as amended ("Act" or "Communications Act").[2] In particular, we grant Complainants' claims that BTI's access rates were and are unjust and unreasonable under section 201(b) of the Act.[3] In conjunction with granting these claims, we define a just and reasonable rate on which Complainants' damages should be based. Further, we deny AT&T's claim for relief arising from BTI's alleged cross-subsidization, assertedly in violation of section 254(k) of the Act.[4]

II. BACKGROUND

A. The Parties

2. AT&T and Sprint are, *inter alia*, non-dominant interexchange carriers ("IXCs").[5] BTI is a competitive local exchange carrier ("CLEC") that provides facilities-based interstate and intrastate exchange access services, telephone toll services, and local exchange services in urban areas of the southeastern United States, including North and South Carolina, Georgia, and Florida.[6] BTI principally serves small business and residential users in the following states and cities: South Carolina – Columbia, Greenville, and Charleston; North Carolina – Raleigh, Greensboro, and Charlotte; Florida – Jacksonville, Tampa, and Orlando; Tennessee – Nashville and Knoxville; and Georgia – Atlanta.[7] As of September 2000, BTI served approximately 125,000 access lines in at least 12 urban areas.[8] In all of BTI's service areas, the incumbent local exchange carrier ("ILEC") was either BellSouth Telecommunications, Inc.

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[1] Second Amended Complaint of AT&T Corp., AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-001 (filed Jan. 29, 2001) ("AT&T Second Amended Complaint"); Complaint of Sprint Communications Company, L.P., Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002 (filed Jan. 16, 2001) ("Sprint Complaint").

[2] 47 U.S.C. § 208.

[3] 47 U.S.C. § 201(b).

[4] 47 U.S.C. § 254(k).

[5] Second Consolidated Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues of AT&T Corp., Sprint Communications Company, L.P., and Business Telecom, Inc., AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-001 and Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002 (filed Mar. 12, 2001) ("Joint Statement"), at ¶¶ 7-8.

[6] Joint Statement at ¶ 10.

[7] Joint Appendix, AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-001 and Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002 (filed Mar. 26, 2001) ("Joint Appendix"), at Exhibit 3, Deposition of Sean Pflaging at 45 ("Pflaging Deposition").

[8] Opening Brief of AT&T Corp., AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-001 and Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002, (filed Mar. 26, 2001) ("AT&T Opening Brief"), at Exhibit 12, Business Telecom Inc.'s November 11, 2000 SEC Form 10-Q.

("BellSouth") or GTE Telephone Operating Companies ("GTE").[9]

B. The Parties' Business Relationship

3. The matters at issue relate to BTI's provision of switched interstate access services to Complainants.[10] Access service generally consists of "originating" access, by which a call is transported from a caller's premises over a local exchange carrier's network to the IXC's network, and "terminating" access, by which a call is transported from the IXC's network over a local exchange carrier's network to the called party's premises.[11]

4. BTI's rates for its switched interstate access services were set forth in its FCC Tariff No. 4, which BTI initially filed with the Commission in July 1998.[12] At all relevant times, BTI's tariffed switched access rate per minute of use was 7.1823 cents per minute for both originating and terminating access.[13] BTI did not base its access rates on any analysis of its costs of providing access service.[14] Instead, BTI developed its access rates by simply reviewing the rates that other CLECs were charging in 1998.[15]

5. Beginning in 1998, BTI invoiced Complainants for access services it provided them.[16] Complainants have only partially paid the invoiced amounts.[17] For example, Sprint has paid BTI at a level approximating the interstate access rates of the ILECs operating in BTI's service areas, which rates are substantially below BTI's.[18] Complainants assert that they refused to pay the invoiced amounts because, in their view, (1) BTI's access rates were unreasonably high; (2) Complainants never actually "ordered" BTI's access services; and, (3) in any event, Complainants properly requested discontinuance

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[9] Joint Statement at ¶ 15. GTE merged with Bell Atlantic Telephone Companies in June 2000, and the successor entity is now known as Verizon, Inc.

[10] Joint Statement at ¶ 11.

[11] *Id.*

[12] Joint Appendix, at Exhibit 4, Deposition of Jean Houck at 21-22 ("Houck Deposition"). *See* Joint Statement at ¶ 13.

[13] BTI's access rate is the sum of its local switching charge per minute of use ($0.063) and its transport charge per minute of use ($0.0084), for a total of $0.0714 per minute, plus a charge of $0.000423 per minute per mile for transport mileage (the total rate in the text above is based on one mile of transport mileage). BTI also charges, where appropriate, an 800 database per query charge ($0.0079). Joint Statement at ¶¶ 19-20.

[14] Joint Statement at ¶ 23. BTI contends that it did not have the resources to conduct any financial analyses, cost models, or cost studies. *See* Joint Appendix, at Exhibit 3, Pflaging Deposition at 129.

[15] Joint Statement at ¶ 24.

[16] Joint Statement at ¶¶ 17-18.

[17] Joint Statement at ¶¶ 35-36, 54.

[18] Joint Statement at ¶ 53.

of any "ordered" access services.[19]

C. The Procedural History

6. These complaint proceedings arise from primary jurisdiction referral orders in *Advamtel, LLC d/b/a Plan B Communications, et al. v. Sprint Communications Co.*, and *Advamtel, LLC d/b/a Plan B Communications, et al. v. AT&T Corp.* (collectively "*Advamtel Litigation*").[20] BTI and other CLECs filed suit in the *Advamtel Litigation* against AT&T and Sprint for nonpayment of the CLECs' interstate access charges.[21] In response, AT&T and Sprint filed several counterclaims against BTI and other CLECs, including counterclaims challenging the lawfulness of the CLECs' access rates under section 201(b) of the Act.[22] AT&T also alleged that BTI and other CLECs used excess access revenues to cross-subsidize their long distance and local exchange services, in violation of section 254(k) of the Act.[23]

7. In July 2000, the federal district court granted Complainants' motions to refer certain of their counterclaims to the Commission pursuant to the doctrine of primary jurisdiction.[24] Specifically, the court referred Complainants' claims that BTI and other CLECs charged unreasonably high access rates, in violation of section 201(b) of the Act.[25] The court also referred AT&T's claim that BTI and other CLECs engaged in cross-subsidization prohibited by section 254(k) of the Act.[26]

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[19] AT&T Second Amended Complaint, ¶¶ 4, 14-18; Sprint Complaint, ¶¶ 9-10.

[20] *Advamtel LLC, et al., v. AT&T Corp.*, 105 F. Supp.2d 507 (E.D. Va. 2000); *Advamtel LLC, et al., v. Sprint Communications Company, L.P.*, 105 F. Supp.2d 476 (E.D. Va. 2000); Joint Statement at ¶ 1.

[21] *Advamtel, LLC, et al. v. AT&T Corp.*, Civil Action No. 00-643 (E.D. Va. Jan. 5, 2000); *Advamtel, LLC, et al. v. Sprint Communications Company, L.P.*, Civil Action No. 00-1074-A (E.D. Va. Jan. 5, 2000).

[22] Joint Statement at ¶ 2. Section 201(b) of the Act provides, in pertinent part: "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful . . .." 47 U.S.C. § 201(b).

[23] AT&T Opening Brief, at Exhibit 57, Counterclaim IV of Answer to Second Amended Complaint and Counterclaims of AT&T Corp., *Advamtel, LLC, et al. v. AT&T Corp.*, Civil Action No. 00-643 (filed Aug. 18, 2000); *Advamtel. v. AT&T Corp.*, 105 F. Supp.2d at 510.

[24] *Advamtel v. AT&T*, 105 F. Supp.2d at 515; *Advamtel v. Sprint*, 105 F. Supp.2d at 483.

[25] *Advamtel v. AT&T*, 105 F. Supp.2d at 511-12; *Advamtel v. Sprint*, 105 F. Supp.2d at 481.

[26] *Advamtel v. AT&T*, 105 F. Supp.2d at 511-12; Joint Statement at ¶ 3. Subsequently, on January 5, 2001, the court referred two additional issues to the Commission under the doctrine of primary jurisdiction. *Advamtel LLC, et al. v. Sprint Communications Company, L.P.*, 125 F. Supp.2d 800 (E.D. Va. 2001). Pursuant to this latter referral, Complainants filed with the Commission two Petitions for Declaratory Ruling regarding the following issues: (1) whether any statutory or regulatory constraints prevent an IXC from declining access services, or from terminating access services previously ordered or constructively ordered; and if not, (2) what steps must IXCs take either to avoid ordering access service or to cancel service after it has been ordered or constructively ordered. *AT&T and Sprint File Petitions for Declaratory Ruling on CLEC Access Charge Issues*, CCB/CPD File No. 01-02, Public Notice, DA-01-301, 2001 WL 92220 (Com. Car. Bur. Feb. 5, 2001) (establishing a public comment period ending on March 2, 2001).

8. To effectuate the court's referrals, Complainants filed these formal complaints against BTI with the Commission on January 16, 2001, and the Enforcement Bureau promptly consolidated them.[27] Complainants contend that BTI's access rates are unjustly and unreasonably high under section 201(b) of the Act.[28] AT&T also contends that BTI cross-subsidized its retail local and long distance services with revenues from its access services, in violation of section 254(k) of the Act.[29]

III. DISCUSSION

A. The Commission Has Authority to Adjudicate the Lawfulness of BTI's Past and Present Access Rates.

9. BTI makes several arguments challenging the Commission's authority to review the rates at issue.[30] BTI first alleges that its access rates are conclusively presumed to be lawful because the rates are contained in a validly filed tariff.[31] To support this argument, BTI correctly observes that we must presume tariffed rates to be reasonable when the tariff has been validly filed.[32] This presumption of reasonableness is rebuttable, however, in the context of a section 208 complaint alleging a violation of section 201(b).[33] Consequently, even though Complainants do not challenge the validity of the filing of

[27] Joint Statement at ¶ 4. *See* Letter from Anthony J. DeLaurentis, Attorney, Market Disputes Resolution Division, Enforcement Bureau, to James Bendernagel, Counsel for AT&T; Jonathan E. Canis, Counsel for BTI; and Cheryl A. Tritt, Counsel for Sprint, AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-001 and Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002 (dated Feb. 15, 2001). To effectuate further the court's referrals, both AT&T and Sprint filed informal complaints against all of the other CLECs remaining in the *Advamtel Litigation* pursuant to sections 1.716-18 of the Commission's rules. 47 C.F.R. §§ 1.716-18.

[28] AT&T Second Amended Complaint, ¶¶ 3, 5-6, 20-35; Sprint Complaint, ¶ 2, 12-23. This claim appears in Counts I, II, and III of Sprint's Complaint, which we consider collectively rather than individually, and in Count I of AT&T's Second Amended Complaint.

[29] AT&T Second Amended Complaint, ¶¶ 36-42. Complainants request that the Commission (1) declare that BTI's access rates were and are unjust and unreasonable; (2) determine the lawful rate for the disputed past period for purposes of calculating damages; (3) prescribe a just and reasonable rate going forward; and (4) require BTI to revise its tariff to lower its access charges to such prescribed level. Complainants also request damages in an amount to be determined in a supplemental damages proceeding. AT&T Second Amended Complaint, Prayer for Relief ¶¶ 1-5; Sprint Complaint, ¶¶ 25-26.

[30] BTI included some of these arguments – as well as others – in a motion to dismiss. Motion to Dismiss of Business Telecom, Inc., AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-001 and Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002 (filed Mar. 8, 2001). Because we address in this Order all of the arguments made by BTI in its Motion to Dismiss, we dismiss the Motion as moot.

[31] Initial Brief of Business Telecom, Inc., AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-001 and Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002 (filed Mar. 26, 2001) ("BTI Initial Brief"), at 6-7.

[32] BTI Initial Brief at 6-10, 13. *See generally Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd 2170, 2181-82 (1997) ("*Section 402 Order*").

[33] *See, e.g., Arizona Grocery Co. v. Atchison, T. & S. Ry. Co., et al.*, 284 U.S. 370 (1932) (holding that damages relating to tariffed charges are recoverable if the tariffed rate is proven to be unreasonable) ("*Arizona* (continued....)

BTI's tariff, we have authority to conclude in this proceeding that BTI's tariffed access rates were and are unjust and unreasonable in violation of section 201(b).[34]

10. According to BTI, any specification of a just and reasonable rate for past periods in order to calculate damages would constitute prohibited retroactive ratemaking.[35] As support for its position, BTI points out that section 205 only permits the Commission to impose *prospective* rate changes.[36] BTI's assertions disregard the fact that our authority to award damages stems from sections 207, 208, and 209 of the Act, and not section 205.[37] The adjudicatory scheme established by Congress specifically allows for the recovery of damages in instances such as this. Section 208(b) expressly refers to complaints involving "the lawfulness of a charge,"[38] and section 207 permits complainants to recover

(Continued from previous page)
Grocery"); *Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC No. 01-146, 2001 WL 431685, ¶ 21 (rel. Apr. 27, 2001) ("*CLEC Access Charge Order*"); *New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 15 FCC Rcd 5128, 5133 (2000) ("*New Valley Corp. v. Pacific Bell*"); *Halprin, Temple, Goodman & Sugrue v. MCI Telecommunications Corporation, et al.*, Memorandum Opinion and Order, 13 FCC Rcd 22568, 22573 (1998) ("*Halprin Order*"), *recon. denied*, 14 FCC Rcd 21092 (1999); *Hyperion Telecommunications, Inc. Petition for Forebearance*, Memorandum Opinion and Order, 12 FCC Rcd 8596, 8609 (1997) ("*Hyperion Order*"); *Section 402 Order*, 12 FCC Rcd at 2182; *Communications Satellite Corporation*, Memorandum Opinion and Order, 3 FCC Rcd 2643, 2647 (1988); *National Exchange Carrier Association, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 3679, at ¶ 5 (1987).

[34] Despite its argument to the contrary, BTI admits in its Amended Answer to Sprint's Complaint that, even as a non-dominant carrier, its rates are subject to section 201(b), and that its tariffs may be challenged under section 208 of the Communications Act. Amended Answer of Business Telecom, Inc. to Sprint Complaint, Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002 (filed Feb. 14, 2000), at ¶ 11.

[35] BTI Initial Brief at 60-62; Consolidated Reply Brief of Business Telecom, Inc., AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-001 and Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002 (filed Apr. 2, 2001) ("BTI Reply Brief"), at 54-57.

[36] BTI Reply Brief at 55-56. Section 205 of the Act provides, in pertinent part: "[T]he Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed . . . ." 47 U.S.C. § 205.

[37] 47 U.S.C. §§ 207-09. Hence, BTI's reliance on *Illinois Bell Telephone Co. v. FCC*, 966 F.2d 1478 (D.C. Cir. 1992) is misplaced. BTI Reply Brief at 55. In *Illinois Bell*, the Court held that, absent a pre-existing tariff suspension order, the Commission lacks authority *under sections 204 and 205* of the Act to invalidate a tariffed rate and direct the carrier to pay refunds to its customers based on the difference between the tariffed rate and a newly prescribed, reasonable rate. The Commission had not acted under — and the court therefore did not address — the Commission's damage-awarding authority under sections 207 – 209 of the Act. Accordingly, as the Commission has repeatedly ruled, sections 204 and 205 of the Act do not preclude the Commission from awarding damages under sections 207 – 209 of the Act arising from a carrier's unreasonable tariffed rates. *See, e.g., AT&T v. Telephone Utilities Exchange Carrier Association*, Memorandum Opinion and Order, 10 FCC Rcd 8405, 8414-15 (1995) (emphasizing that actions brought under section 208 are different from those brought under sections 204-205); *Complaints Alleging Violations of Section 208 of the Commission's Rate of Return Prescription for the 1989-90 Monitoring Period*, Memorandum Opinion and Order, 10 FCC Rcd 3657, 3664-65 (1994).

[38] 47 U.S.C. § 208(b)(1).

damages pursuant to section 208.[39] Moreover, section 209 states that, "[i]f after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages . . ., the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled . . . ."[40]

11. The Commission has repeatedly explained its statutory authority to award damages in section 208 complaint cases concerning the lawfulness of tariffed charges. For example, the Commission has previously stated that, if "a tariff filing is subsequently determined to be unlawful in a complaint proceeding commenced under section 208 of the Act, customers who obtained service under the tariff prior to that determination may be entitled to damages."[41] The Commission also has held "that a proper measure of the damages suffered by a customer as a consequence of a carrier's unjust and unreasonable rate is the difference between the unlawful rate the customer paid and a just and reasonable rate."[42] Consistent with this authority to award damages arising from unlawful rates, the Commission has stated on several occasions that, in lieu of directly regulating CLEC access rates, the Commission would, instead, rely on complaints filed under section 208 seeking to enforce the "just and reasonable" standard of section 201(b) to constrain and discipline CLEC access rates.[43]

12. Federal court decisions confirm the Commission's statutory authority to award damages in section 208 complaint cases concerning the lawfulness of tariffed charges. In upholding a Commission order invalidating a tariff, the D.C. Circuit recently rejected as "clearly wrong" the view that "relief under Section 208 of the Act cannot be retroactive in effect."[44] In doing so, the D.C. Circuit stated that, "insofar as Section 208 authorizes the award of damages or other remedies, it is always 'retroactive' in its application in that it will always be changing the economic consequences of a carrier's prior conduct."[45] Thus, we conclude that we have the authority, in the context of this complaint proceeding, to establish the reasonable rates that BTI should have charged during the period at issue to

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[39] 47 U.S.C. §207 (stating, in pertinent part, that "[a]ny person claiming to be damaged by any common carrier subject to the provisions of this Act may make . . . *complaint to the Commission* as hereinafter provided for . . . .") (emphasis added).

[40] 47 U.S.C. § 209.

[41] *Section 402 Order*, 15 FCC Rcd at 2183. *See also* footnote 33, *supra*.

[42] *New Valley Corp. v. Pacific Bell*, 15 FCC Rcd at 5133.

[43] *See Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, 16141, at ¶ 363 (1997) ("*Access Charge Reform Order*"); *Hyperion Order*, 12 FCC Rcd at 8597, ¶ 2, 8609, ¶ 25. Thus, BTI had ample notice that there was an outside limit on the level of access rates that it could lawfully charge without risking the imposition of damages in a complaint proceeding.

[44] *Global NAPs v. Federal Communications Commission, et al.*, 247 F.3d 252, 2001 WL 427607, at *7 (D.C. Cir. 2001).

[45] *Global Naps v.* FCC, 247 F.3d 252, 2001 WL 427607, at *7. *See Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 786 (D.C. Cir. 2000) (stating that section 208 enables the Commission, upon complaint by an injured party, to adjudicate the lawfulness of a carrier's past and present rates). *See also ACC Long Distance Corp. v. New York Tel. Co.*, Memorandum Opinion and Order, 9 FCC Rcd 1659, 1661-1662, at ¶ 11 (1994); *Allnet Communication Services, Inc. v. U S West, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 3017, 3021-3022, at ¶¶ 22-24 (1993).

enable the assessment of damages.[46]

13. BTI also argues that the Commission cannot order any prospective rate changes in resolving this complaint, because the Commission's formal complaint procedures did not afford BTI a "full opportunity for a hearing" within the meaning of section 205.[47] Although we do not prescribe future rates here, we take this opportunity to make clear that BTI's argument is manifestly incorrect. Section 205(a) of the Act states that "[w]henever, *after full opportunity for hearing*, upon a *complaint* . . . the Commission shall be of opinion that any charge . . . is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge . . . ."[48] Section 205 thus expressly authorizes the Commission to prescribe rates in the context of a complaint proceeding under section 208. The only question is whether the formal complaint procedures employed in this proceeding met the "hearing" requirement contained in section 205.

14. BTI acknowledges that "the language 'after full opportunity for hearing' contained in Section 205 does not trigger the detailed oral hearing requirements of Sections 556 and 557 of the Administrative Procedure Act ['APA']."[49] BTI asserts, nonetheless, that the formal complaint procedures employed here fall short of a "hearing," because they did not amount to notice and comment type rulemaking.[50] Again, we disagree.

15. The "hearing" requirement in section 205 means that a defendant in a complaint proceeding must have fair notice of, and reasonable opportunity to comment upon, the issues raised concerning the appropriate level of its future rates.[51] BTI was amply afforded such notice and comment opportunity here. The parties filed substantial pleadings and briefs, conducted extensive discovery – including interrogatories, document requests, and depositions – participated in several in-person and telephonic conferences with Commission staff, and submitted dozens of documentary exhibits. Thus, we reject BTI's argument that the procedures employed here do not amount to a "hearing."

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[46] *See, e.g.*, *Arizona Grocery*, *supra*; *CLEC Access Charge Order*, 2001 WL 431685, ¶ 21; *New Valley Corp. v. Pacific Bell*, 15 FCC Rcd at 5133; *Halprin Order*, 13 FCC Rcd at 22573; *Access Charge Reform Order*, 12 FCC Rcd at 16141; *Hyperion Order*, 12 FCC Rcd at 8609; *Section 402 Order*, 12 FCC Rcd at 2182; *Communications Satellite Corporation*, 3 FCC Rcd at 2647; *National Exchange Carrier Association, Inc.*, 2 FCC Rcd at 3679.

[47] BTI Initial Brief at 58-60; BTI Reply Brief at 34-37.

[48] 47 U.S.C. § 205 (emphasis added).

[49] BTI Reply Brief at 34.

[50] *Id.*

[51] *See generally United States, et al. v. Florida East Coast Railway, Co.* 410 U.S. 224, 239 (1973) (finding that a similar hearing requirement in the Interstate Commerce Act did not trigger the detailed oral hearing requirements of sections 556 and 557 of the APA; *AT&T v. FCC*, 572 F.2d 17, 22 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978); *American Telephone and Telegraph Co. Wide Area Telecommunications Services*, Memorandum Opinion and Order, 67 FCC 2d 246, 248, at ¶ 5 (1977) (stating that section 205 requirements can be met via a paper hearing); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, Notice of Proposed Rulemaking, 11 FCC Rcd 18877, 18928, at ¶ 106 (1996) (noting that section 205 proceedings generally occur through written responses).

16. In any event, even if some type of notice and comment rulemaking procedures were required by section 205, we find that the procedures employed here more than adequately met those requirements. Section 553 of the APA governs rulemaking procedures, and it permits the Commission to forego publication of a proposed rule in the Federal Register if "persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law."[52] Section 553 further requires that persons subject to the rule be given an opportunity to submit "written data, views or arguments."[53] Here BTI, the sole defendant in this complaint proceeding, had actual notice of this proceeding and a full opportunity to submit data, views, and arguments. We thus have ample authority under sections 205 and 208 of the Act to prescribe a tariffed access rate that BTI must charge in the future.

B. BTI's Access Rates are Unjust and Unreasonable Under Section 201(b).

1. Marketplace Data, Rather than BTI's Costs, Provide the Principal Tools for Assessing the Reasonableness of BTI's Access Rates.

17. The parties agree that we should assess the reasonableness of BTI's access rates by evaluating the market for access services, rather than by ascertaining BTI's costs of providing access services.[54] The parties are correct, for at least two reasons.

18. First, the Commission has interpreted the Telecommunications Act of 1996[55] as directing the Commission to refrain – whenever possible – from applying to CLECs the legacy, cost-based regulations long applicable to the access services of ILECs.[56] For example, the Commission has found

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[52] 5 U.S.C.§ 553(b).

[53] 5 U.S.C. § 553(c).

[54] BTI Initial Brief at 7-13, 21; AT&T Opening Brief at 11-14; Opening Brief of Sprint Communications Company, L.P., AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-001 and Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002 (filed Mar. 26, 2001) ("Sprint Opening Brief"), at 18-23.

[55] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151 *et. seq.*) ("1996 Act").

[56] *See, e.g., Access Charge Reform Order*, 12 FCC Rcd at 16094-105, ¶¶ 262-84. In contrast to the situation with CLECs, the Commission's rules prescribe the precise manner in which ILECs may assess interstate access charges on interexchange carriers and end users. First, an ILEC must keep its books in accordance with the Uniform System of Accounts set forth in Part 32 of the Commission rules. *See* 47 C.F.R. §§ 32.1 – 32.9000. Second, Part 64 of the Commission's rules divides an ILEC's costs between those associated with regulated telecommunications services and those associated with non-regulated activities. *See* 47 C.F.R. §§ 64.901 - 64.904. Third, Part 36 separations rules determine the fraction of the ILEC's regulated costs, expenses, and investment that should be allocated to the interstate jurisdiction. *See* 47 C.F.R. §§ 36.1 - 36.741. After the total amount of regulated, interstate cost is identified, the access charge and price cap rules translate these interstate costs into charges for the specific interstate access services and rate elements. Part 69 specifies in detail the rate structure for recovering these costs. *See* 47 C.F.R. §§ 69.1 - 69.731. Finally, Part 61 requires ILECs to publish their rates in tariffs, and the rules restrict how and when incumbents may change their rates. *See* 47 C.F.R. §§ 61.1 - 61.193. Additionally, the Commission regulates the rate levels ILECs may charge for their access services, requiring them to comply with either the rate-of-return or the price-cap regulations. *Compare* 47 C.F.R. §§ 65.1 - 65.830 (relating to rate of return that certain non-price-cap ILECs may earn on interstate access service) *with* (continued....)

that, in light of the 1996 Act, "[c]ompetitive markets are superior mechanisms for protecting consumers" by ensuring that services are provided and priced in the most efficient possible manner.[57] The Commission also has determined that reliance on competitive market forces "minimize[s] the potential that regulation will create and maintain distortions in the investment decisions of competitors as they enter local communications markets."[58] As a result, the Commission has concluded that the policies and purposes of the 1996 Act demand a "market-based approach" to the regulation of access charges.[59] Consequently, the Commission has chosen not to apply the historical ILEC rules and regulations to CLECs.[60] Examining BTI's costs as the touchstone of the reasonableness of BTI's rates would contradict this trend towards reliance on market factors to dictate appropriate rates.

19. Second, given the Commission's decision not to apply to CLECs the accounting and separations rules applicable to ILECs, there would be substantial "legal and practical difficulties involved with comparing CLEC rates to any objective [*i.e.*, cost-based] standard of reasonableness."[61] Moreover, precedent exists for examining the reasonableness of rates by means other than reviewing the costs of an individual CLEC.[62]

20. Although the parties correctly agree that we should examine market factors rather than BTI's costs in determining whether BTI's access rates are just and reasonable, they differ as to the scope and nature of such examination. Complainants argue that, because of market failures in the access services market, the Commission should examine certain market statistics – such as ILEC access rates, other CLECs' access rates, BTI's reciprocal compensation rates, and BTI's local and long distance rates -- to ascertain what BTI would have charged had the access market been truly competitive.[63] BTI contends, on the other hand, that because the Commission has previously determined that CLECs lack market power, the Commission must essentially assume that BTI was free to charge whatever the market would bear, regardless of whether BTI's access rates exceeded the market indicia proffered by

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Access Charge Reform, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, 13026-13039, at ¶¶ 151-84 (2000) ("*CALLS Order*") (adopting rate level components for price-cap carriers).

[57] *Access Charge Reform Order*, 12 FCC Rcd at 16094-95, ¶ 263.

[58] *Id.*

[59] *Id.*

[60] *See, e.g., Access Charge Reform*, Notice of Proposed Rulemaking, 11 FCC Rcd 21354, 21472, at ¶ 271 (1996) ("*Access Reform NPRM*"); *Access Charge Reform Order*, 12 FCC Rcd at 16140, ¶ 360.

[61] *CLEC Access Charge Order*, 2001 WL 431685, at ¶ 41.

[62] *See CLEC Access Charge Order*, 2001 WL 431685, at ¶ 46 and n.105. *See also* footnotes 72 and 73, *infra*.

[63] AT&T Opening Brief at 11-21; Sprint Opening Brief at 18-32; Reply Brief of AT&T Corp., AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-001 and Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002 (filed Apr. 2, 2001) ("AT&T Reply Brief"), at 4-12; Reply Brief of Sprint Communications Company, L.P., AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-001 and Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002 (filed Apr. 2, 2001) ("Sprint Reply Brief"), at 13-25.

Complainants.[64]

21. We agree with Complainants that we should examine certain market data to determine the reasonableness of BTI's access rates. Despite previous indications that market forces might constrain CLEC access rates, the Commission recently found that, in actuality, the market for access services is not structured in a manner that allows competition to discipline rates.[65] Specifically, the Commission found that the originating and terminating access markets consist of a series of bottleneck monopolies over access to each individual end user.[66] Once an end user decides to take service from a particular LEC, that LEC controls an essential component of the wireline system that provides interexchange calls, and it becomes a bottleneck for IXCs wishing to complete calls to, or carry calls from, that end user.[67] Thus, with respect to access to their own end users, CLECs have just as much market power as ILECs.[68] In addition, the Commission determined that "the combination of the market's failure to constrain CLEC access rates, the Commission's geographic rate averaging rules for IXCs, the absence of effective limits on CLEC rates and the tariff system created an arbitrage opportunity for CLECs to charge unreasonable access rates."[69]

22. Given these competitive failures in the CLEC access market, we must decline BTI's invitation to take a *laissez faire* approach to its access rates. Because the CLEC access market is not truly competitive, we cannot simply assume that "whatever the market will bear" translates into a just and reasonable rate.[70] Instead, to "correct" retroactively the market failures described above, we must examine market factors to try to ascertain whether BTI's rates were just and reasonable. If our examination of these factors reveals that BTI charged just and reasonable access rates, despite its market power, then we must deny Complainants' complaints. If our examination demonstrates otherwise, then we must invalidate those access rates and determine what reasonable access rates would have been for purposes of calculating damages.

2. Rates for Services Using Comparable Network Functions are Appropriate Marketplace Data on Which to Assess the Reasonableness of BTI's Access Rates.

23. Complainants argue that comparing BTI's access rates to the rates charged by BTI and others for services using comparable network functions is an appropriate mechanism for determining

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[64] BTI Initial Brief at 6-14, 16-34.

[65] *CLEC Access Charge Order*, 2001 WL 431685, at ¶¶ 30-32.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *CLEC Access Charge Order*, 2001 WL 431685, at ¶ 34.

[70] In any event, in this case, the market did not really "bear" BTI's access rates, as demonstrated by Complainants' refusal to pay those rates.

whether BTI's access rates were and are just and reasonable pursuant to section 201(b).[71] We agree. The Commission has previously recognized that services offered under substantially similar circumstances using similar facilities lead to the expectation of similar charges.[72] In addition, the Commission has frequently used rate comparisons, benchmarks, and non-cost factors to evaluate the justness and reasonableness of rates and to prescribe just and reasonable rates for regulated entities.[73] Moreover, examining rates for services using comparable network functions is consistent with the Commission's *CLEC Access Charge Order*.[74] In that order, the Commission compared existing CLEC access rates with what the rates likely would have been in a properly functioning competitive market, and prospectively limited CLEC's tariffed access rates in an effort to mimic the actions of a competitive marketplace.[75]

24. We reject BTI's assertion that prior Commission orders or court decisions prohibit such comparisons.[76] Our approach fully comports with the Commission's prior decisions to rely upon market forces and complaint proceedings to constrain and discipline CLEC access rates.[77] In particular, in

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[71] AT&T Opening Brief at 11-21; Sprint Opening Brief at 18-32; AT&T Reply Brief at 4-12; Sprint Reply Brief at 13-25.

[72] *See Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, Second Report and Order, 12 FCC Rcd 18730, 18790-93 (1997) ("*Expanded Interconnection Order*"), *aff'd, Southwestern Bell Telephone Company v. Federal Communications Commission*, 168 F.3d 1344 (D.C. Cir. 1999) ("*Southwestern Bell v. FCC*"); *U.S. Dept. of Defense v. Hawaiian Telephone Company*, Memorandum Opinion and Order, 61 FCC 2d 565, 566-68 (1976).

[73] *See, e.g., Access Charge Reform Order*, 12 FCC Rcd at 16141-42, ¶ 364; *Expanded Interconnection Order*, 12 FCC Rcd at 18790-93; *Annual 1990 Access Tariff Filings*, Memorandum Opinion and Order, 5 FCC Rcd 7487 (1990) (rejecting rates 8 times higher than benchmark rate); *Beehive Telephone Co.*, Memorandum Opinion and Order, 13 FCC Rcd 12275 (1998) (rejecting rate above "industry averages" for comparable companies); *Operator Communications, Inc. d.b.a. Oncor Communications, Inc.*, Memorandum Opinion and Order and Order to Show Cause, DA-95-02, 1995 WL 248343 (Com. Car. Bur. Apr. 27, 1995) ("*Oncor Communications*") (finding that rates that "substantially exceed" rates charged by other service providers for comparable services in the same market to be unjust and unreasonable); *Capital Network System, Inc.*, Memorandum Opinion and Order and Order to Show Cause, 10 FCC Rcd 13732 (1995) (same as *Oncor Communications*); *International Settlement Rates*, Report and Order, 12 FCC Rcd 19806, 19943 at ¶ 295 (1997), *aff'd, Cable & Wireless PLC v. Federal Communications Commission*, 166 F.3d 1224 (D.C. Cir. 1999) (establishing benchmark governing international settlement rates based, in part, upon non-cost factors). Cases decided under the Interstate Commerce Act, from which the Communications Act derived, also determine the reasonableness of a carrier's rates by comparing them to the rates of other carriers and other rates of the same carrier. *See, e.g., Railroad Comm'rs of Fla. v. Seaboard Air Line Ry.*, 16 ICC 1, 5 (1909) (examining charges by carrier's competitor for similar services to determine the reasonable rate); *Freight Bureau v. Cincinnati, N.O. & Tx. Pac. Ry. Co.*, 4 ICC 92 (1894) ("where the reasonableness of rates is in question, comparison may be made, not only with rates on another line of the same carrier, but also with those on the lines of other and distinct carriers").

[74] *CLEC Access Charge Order*, 2001 WL 431685, at ¶ 60.

[75] *CLEC Access Charge Order*, 2001 WL 431685, at ¶¶ 44-45.

[76] BTI Initial Brief at 16-25; BTI Reply Brief at 38-41.

[77] *See, e.g., Access Reform NPRM*, 11 FCC Rcd at 21472, at ¶ 271; *Access Charge Reform Order*, 12 FCC Rcd at 16140, ¶ 360; *Hyperion Order*, 12 FCC Rcd at 8609, ¶ 25.

choosing not to regulate CLEC access rates, the Commission has previously concluded that, if it needed to examine the reasonableness of a CLEC's access rates in an individual complaint case, it could do so by taking into account all relevant factors, including relationships to other rates.[78] Similarly, the Commission has acknowledged that an upward disparity between a CLEC's access rates and those charged by the ILEC serving the same market may suggest that the CLEC's access rates are excessive.[79]

25. Moreover, the Commission has broad discretion in selecting methods to evaluate the reasonableness of rates.[80] In fact, courts are "particularly deferential" when reviewing the Commission's evaluation of rates, because such agency action is far from an exact science and involves "policy determinations in which the agency is acknowledged to have expertise."[81] As long as the Commission makes a "reasonable selection from the available alternatives," its selection of rate evaluation methods will be upheld, "even if the court thinks [that] a different decision would have been more reasonable or desirable."[82]

26. Contrary to BTI's argument, we find that *Sprint v. MGC*[83] does not require denial of Complainants' claims.[84] In *Sprint v. MGC*, Sprint argued that MGC's tariffed access rates were unjust and unreasonable under section 201(b) *solely* because they exceeded the rates charged by the competing ILECs.[85] The Commission denied Sprint's claim, because doing otherwise would have effectively

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[78] *See Access Charge Reform Order*, 12 FCC Rcd at 16141, ¶ 363. *See also Hyperion Order*, 12 FCC Rcd at 8609, ¶ 25.

[79] *See Access Charge Reform Order*, 12 FCC Rcd at 16142, ¶ 364. *See also Hyperion Order*, 12 FCC Rcd at 8609, ¶ 25.

[80] *See, e.g., Southwestern Bell v. FCC*, 168 F.3d at 1352; *MCI Telecommunications Corp. v. FCC*, 675 F.2d 408, 413 (D.C. Cir. 1982); *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1228 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981).

[81] *Southwestern Bell v.* FCC, 168 F.3d at 1352 (internal quotations omitted). *See Time Warner Entertainment v. FCC*, 56 F.3d 151, 163 (D.C. Cir. 1995) (*quoting United States v. FCC*, 707 F.2d 610, 618 (D.C. Cir. 1983)).

[82] *Southwestern Bell v.* FCC, 168 F.3d at 1352 (*quoting MCI v. FCC*, 675 F. 2d at 413).

[83] *Sprint Communications Company, L.P. v. MGC Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 14027 (2000) ("*Sprint v. MGC*").

[84] BTI Initial Brief at 17-19, 22, 35-36; BTI Reply Brief at 9, n. 10, 12-15, 28. Although *Sprint v. MGC* does not preclude Complainants' claims that BTI's total access rates are unjust and unreasonable under section 201(b), we find that it does affect Complainants' claim that BTI's 800 database query charge of 0.79 cents per call is unjust and unreasonable. AT&T Second Amended Complaint, ¶ 14, n.4; Sprint Complaint, ¶ 12. Complainants cursorily assert that BTI's 800 database query charge is unjust and unreasonable *solely* because it exceeded BellSouth's 800 database query charge in 2000. AT&T Opening Brief at 14, n. 15; Sprint Opening Brief at 19. This evidence alone is insufficient under *Sprint v. MGC*. Moreover, BTI's charge in 2000 was actually less than the average of GTE's charges in the relevant region (*i.e.*, .84 cents per call). Therefore, to the extent that Complainants' allegations concerning BTI's 800 database query charge can be deemed to constitute a stand-alone claim, the claim is denied; and we do not consider this query charge in the rest of our analysis above.

[85] *Sprint v. MGC*, 15 FCC Rcd at 14028-29.

established a *per se* requirement that CLEC access rates never exceed ILEC access rates.[86]

27. Unlike in *Sprint v. MGC*, the competing ILEC rate is only one of several factors on which Complainants rely to assert that BTI's rates are unjust and unreasonable. These other factors include: (1) the rates charged by other ILECs operating outside of BTI's service areas: (2) BTI's rate to its end-user customers for competitive services such as local exchange and long distance; (3) access rates charged by other CLECs; and (4) the rate BTI accepts as compensation for the transport and termination of local exchange traffic.[87] Thus, *Sprint v. MGC* is inapposite.

28. Moreover, we disagree with BTI that the *Permian Basin Area Rate Cases*[88] limit the Commission's ability to use market benchmarks in assessing the justness and reasonableness of a purportedly market-based rate.[89] To the contrary, this decision clearly demonstrates that there is no single regulatory formula required in assessing the justness and reasonableness of a carrier's rates.[90]

29. We also disagree with BTI that *Beehive Telephone*[91] and *IT&E Overseas*[92] limit our ability to rely on rate comparisons to assess the validity of BTI's access rates.[93] In *Beehive Telephone*, the Commission prescribed a carrier's rates using a methodology based on industry averages for comparable carriers.[94] BTI mistakenly characterizes this holding as imposing rigid rules on the Commission's rate analysis. Rather than narrowing the Commission's flexibility, *Beehive Telephone* rests on the broad discretion that courts have afforded the Commission in "selecting methods ... to make

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[86] *Sprint v. MGC*, 15 FCC Rcd at 14029 ("Relying, as it does, solely on the competing ILEC rate as a benchmark for what is just and reasonable, Sprint has failed to meet its burden in this action.").

[87] AT&T Opening Brief at 11-21; Sprint Opening Brief at 18-32; AT&T Reply Brief at 4-12; Sprint Reply Brief at 13-25.

[88] *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) ("*Permian Rate Base Cases*").

[89] BTI Reply Brief at 38-41.

[90] *See CLEC Access Charge Order*, 2001 WL 431685, at ¶ 46, n.105. In the *Permian Basin Area Rate Cases*, the Supreme Court stated that "rate-making agencies are not bound to the service of any single regulatory formula" and are permitted "to make the pragmatic adjustments which may be called for by particular circumstances." *Permian Rate Base Cases*, 390 U.S. at 776-77 (citing *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942)). *See FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979) (holding that agency is not required "to adhere rigidly to a cost-based determination of rates, much less to one that bases each producer's rates on his own costs") (internal quotations omitted); *American Public Gas Association v. Federal Power Commission*, 576 F.2d 1016, 1037 (D.C. Cir. 1977) (approving economic modeling as basis for ratemaking).

[91] *Beehive Telephone Company, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 12275 (1998) ("*Beehive Telephone*").

[92] *IT&E Overseas, Inc. v. Micronesian Telecommunications Corporation*, Memorandum Opinion and Order, 13 FCC Rcd 16058 (1998) ("*IT&E Overseas*").

[93] BTI Initial Brief at 16-22 ; BTI Reply Brief at 38-41.

[94] *Beehive Telephone*, 13 FCC Rcd at 12286.

and oversee rates."[95] Thus, *Beehive Telephone* reflects the understanding that federal agencies with ratemaking authority similar to the Commission's may establish a regulatory scheme that produces a "zone of reasonableness" for rates, rather than insisting upon a single method of determining whether rates are just and reasonable.[96] In *IT&E Overseas*, the Commission declined to find that the rates of a price cap regulated LEC were unlawful merely because they differed from the rates of a rate-of-return regulated LEC participating in NECA's cost averaging pools.[97] *IT&E Overseas* does not undermine our approach, however, because both of the ILECs involved in that case, unlike BTI, were subject to regulatory regimes that operated to constrain the carriers' access pricing and to prevent the carriers from misusing their monopoly power. Other than section 201(b), BTI is not subject to any such regulatory constraints.[98]

30. Accordingly, we conclude that comparing BTI's access rates to the rates charged by BTI and others for services using comparable network functions is an appropriate mechanism for determining the justness and reasonableness of BTI's access rates under section 201(b). We proceed to do so below.

a. BTI's Access Rate Greatly Exceeds ILECs' Access Rates.

31. The access rates charged by ILECs operating in BTI's service areas are a relevant benchmark, because ILEC switched access services are functionally equivalent to CLEC switched access services. In addition, according to fundamental economic principles, in a properly functioning competitive market, the access rates of BTI's primary access competitors would have been a substantial factor in BTI's setting of its own access rates.[99] Indeed, in other markets, BTI's pricing behavior adhered to these principles. BTI's rates for its local exchange service were approximately 15 to 25 percent below those of its primary competitors, BellSouth and GTE;[100] and BTI's rates for long distance service were roughly the same as those of its primary IXC competitors.[101]

32. Nevertheless, during all relevant times, BTI's access rate was significantly higher than the competing ILECs' rates. In July 2000, BTI's access rate of 7.1823 cents per minute was more than 15 times higher than BellSouth's average rate of approximately 0.48 cents per minute,[102] and more than 7

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[95] *Beehive Telephone*, 13 FCC Rcd at 12286-86. *See MCI v. FCC*, 675 F.2d at 413 (*quoting Aeronautical Radio v. FCC*, 642 F.2d at 1228).

[96] *See, e.g., FERC v. Pennzoil Producing Co.*, 439 U.S. at 517; *American Telephone & Telegraph Company v. Federal Communications Commission*, 836 F.2d 1386, 1390 (D.C. Cir. 1988) (*quoting Jersey Cent. Power & Light v. FERC*, 810 F.2d 1168, 1177 (D.C. Cir. 1987)). *See also Wisconsin v. FPC*, 373 U.S. 294, 309 (1963); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585-86 (1942).

[97] *IT&E Overseas*, 13 FCC Rcd at 16062-16064.

[98] *See* BTI Initial Brief at 13.

[99] *See CLEC Access Charge Order*, 2001 WL 431685, at ¶¶ 37, 45. AT&T Opening Brief, at Exhibit 11, Affidavit of Frederick R. Warren-Boulton ("Warren-Boulton Affidavit"), ¶ 20.

[100] Joint Appendix, at Exhibit 3, Pflaging Deposition at 175-76, 191-93.

[101] *See* Joint Appendix, at Exhibit 3, Pflaging Deposition at 206-09.

[102] We derive BellSouth's access rates by averaging the originating and terminating access rates in BellSouth's tariff filings in effect on July 1, 2000 for the following access rate elements for the relevant service (continued....)

times higher than GTE's average rate of approximately 1.0 cent per minute.[103] In July 1999, BTI's access rate was more than 5 times higher than BellSouth's average rate of approximately 1.4 cents per minute, and more than 3.5 times higher than GTE's average rate of approximately 2.0 cents per minute.[104] In July 1998, BTI's access rate was approximately 4.5 times higher than BellSouth's average rate of approximately 1.6 cents per minute, and more than 2.5 times higher than GTE's average rate of approximately 2.8 cents per minute.[105]

33. BTI argues that comparing its access rates with the access rates of BellSouth and GTE yields irrelevant information, because those carriers' rates were set by price controls rather than market forces, and have different cost structures.[106] We disagree. Although BellSouth's and GTE's access rates

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areas in which BTI competes (based upon hypothetical one-mile transport mileage): access tandem (facility), access tandem (termination), access tandem (switching), carrier common line charge (originating), carrier common line (terminating), local switching, information surcharge, transport interconnection charge, and common multiplexing. *See* BellSouth Telecommunications, Inc., Tariff F.C.C. No. 1 (effective July 1, 2000); AT&T Opening Brief at 14-15. This information is publicly available in the Federal Communications Commission's Information Center at 445 12th Street, N.W., Washington, D.C. 20554. *See also* Sprint Opening Brief, Exhibit 12; AT&T Opening Brief at 14-15; AT&T Opening Brief, Exhibit 10. We do not include the primary interexchange carrier charge ("PICC") in this calculation or our GTE calculation, because nothing timely submitted in this record proposed a methodology for "per-minutizing" this flat per-line charge or proffered data suggesting that the level of this charge was significant on a per-minute basis. On May 22, 2001, well after the record had closed, and only three weeks before the statutory deadline for resolving these complaints, BTI submitted approximately 500 pages of information that, *inter alia*, purports to show what BellSouth and GTE charged for access, and to "per-minutize" GTE's and BellSouth's PICC rates, in the relevant regions during the relevant period. Letter from Ronald J. Jarvis, Counsel for BTI, to Anthony J. DeLaurentis, Attorney, Market Dispute Resolution Division, Enforcement Bureau, AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-001 and Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002 (filed May 22, 2001). We decline to consider this information, because it was untimely filed, depriving both the Commission and Complainants of a fair opportunity to rigorously assess its complex contents.

[103] We derive GTE's access rates by averaging the originating and terminating access rates in GTE's tariff filings in effect on July 1, 2000 for the following access rate elements for the relevant service areas and zones in which BTI competes (based upon hypothetical one mile transport mileage): access tandem (facility), access tandem (termination), access tandem (switching), carrier common line charge (originating), carrier common line (terminating), local switching, information surcharge, transport interconnection charge, and common multiplexing. *See* GTE Telephone Operating Companies, Tariff F.C.C. No. 1 in effect on July 1, 2000. This information is publicly available in the Federal Communications Commission's Information Center at 445 12th Street, N.W., Washington, D.C. 20554.

[104] We derive BellSouth's and GTE's access rates in 1999 in the same manner as those calculated for 2000, based upon BellSouth's and GTE's tariff filings in effect on July 1, 1999. *See* BellSouth Telecommunications, Inc., Tariff F.C.C. No. 1 (effective July 1, 1999); GTE Telephone Operating Companies, Tariff F.C.C. No. 1 in effect on July 1, 1999. This information is publicly available in the Federal Communications Commission's Information Center at 445 12th Street, N.W., Washington, D.C. 20554.

[105] We derive BellSouth's and GTE's access rates in 1998 in the same manner as those calculated for 2000, based upon BellSouth's and GTE's tariff filings in effect on July 1, 1998. *See* BellSouth Telecommunications, Inc., Tariff F.C.C. No. 1 in effect on July 1, 1998; GTE Telephone Operating Companies, Tariff F.C.C. No. 1 in effect on July 1, 1998. This information is publicly available in the Federal Communications Commission's Information Center at 445 12th Street, N.W., Washington, D.C. 20554.

[106] BTI Initial Brief at 17-22; BTI Reply Brief at 19-20.

are subject to price cap regulation, those rates were, nevertheless, the prevailing market rates that BTI would have needed to consider in pricing its access services, had the access market been truly competitive. Consequently, even though they are regulated, BellSouth's and GTE's access rates provide guidance as to the reasonableness of BTI's access rates.

34. Comparing BTI's access rate to those of ILECs operating outside BTI's service areas also provides some guidance, because of the functional equivalence of access services nationwide.[107] BTI's 7.1823 cents per minute access rate is approximately 4 times higher than the 1998 industry average ILEC rate of 1.9 cents per minute, approximately 5 times higher than the 1999 industry average ILEC rate of 1.4 cents per minute, and approximately 8 times higher than the 2000 industry average ILEC rate of 0.96 cents per minute.[108] In addition, BTI's own expert confirmed in a 1999 study that BTI's access rates exceeded industry average rates for ILECs in 1999. This study reports that the average of the access rates charged in 1999 by the Regional Bell Operating Companies,[109] GTE, and Sprint were less than 2 cents per minute, whereas BTI's access rates were almost 4 times higher.[110] This study further reports that the average access rate of all 1,435 ILECs nationwide in 1999 was in the range of 3 cents per minute, whereas BTI's access rates were more than twice as high.[111]

b. BTI's Access Rate Exceeds the Access Rates of Many Other CLECs.

35. Comparing BTI's access rates to those of other CLECs provides further guidance regarding the reasonableness of BTI's rates, again, because of the functional equivalence of access services nationwide.[112] Indeed, BTI has implicitly acknowledged the relevance of other CLECs' access rates, because BTI based its own rates solely on a survey of some other CLECs' rates.[113]

36. According to BTI's own expert, BTI's access rates are considerably higher than the rates

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[107] *See Southwestern Bell v. FCC*, 168 F.3d at 1353 (explaining that "the use of industry-wide averages is one commonly-employed technique in evaluating the reasonableness of rates charged by regulated entities").

[108] *See* Industry Analysis Division, Federal Communications Commission, TRENDS IN TLECOMMUNICATIONS SERVICE (December 2000), Table 1.2. *See also* Industry Analysis Division, Federal Communications Commission, TELECOMMUNICATIONS INDUSTRY REVENUES 1999 (September 2000). This information is publicly available in the Federal Communications Commission's Information Center at 445 12th Street, N.W., Washington, D.C. 20554 and at <http://www.fcc.gov/ccb/stats>. *See generally* AT&T Opening Brief, Exhibit 20.

[109] *See* 47 U.S.C. § 153(4) (defining Bell Operating Companies).

[110] AT&T Opening Brief, at Exhibit 22, QSI Survey. Complainants attribute the data differences in the reports prepared by BTI's experts and by the Commission to the fact that BTI's experts included rate elements that BTI itself does not consider to be part of access. AT&T Opening Brief, at Exhibit 8, Business Telecom, Inc's Responses to AT&T Corp. Interrogatory No. 1; AT&T Opening Brief at 16, n.18.

[111] AT&T Opening Brief, Exhibit 22.

[112] *See generally, Southwestern Bell v. FCC*, 168 F.3d at 1352-53 (approving the use of composite industry data or other averaging methods in evaluating reasonableness of rates).

[113] Joint Statement at ¶¶ 23-24.

charged by many other CLECs.[114] For example, of the 36 CLECs that BTI's expert surveyed in December 2000, only five had access rates as high as BTI's.[115] Moreover, BTI's expert determined that the average access rate of the 36 CLECs was 4.19293 and 4.18519 cents per minute for originating and terminating access, respectively, well below BTI's rate of 7.1823 cents per minute for originating and terminating access.[116]

c. The Differential Between BTI's Access Rate and Reciprocal Compensation Rate is Enormous, and Far Larger than BellSouth's Differential.

37. Complainants argue that we should consider BTI's reciprocal compensation rates in assessing the justness and reasonableness of BTI's access rates.[117] Generally speaking, reciprocal compensation is the manner in which local exchange carriers operating in the same territory compensate each other for the transport and termination of a local call from a customer of one carrier to a customer of another carrier.[118] The Commission has found that "the transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions."[119] Therefore, in determining the reasonableness of BTI's access rates (*i.e.*, rates for transporting and terminating long distance traffic), it is relevant to compare them to BTI's reciprocal compensation rates (*i.e.*, rates for transporting and terminating local traffic).

38. We must assess this comparison differently from the other comparisons described above, however, and give it far less weight. Access rates and reciprocal compensation rates derive from substantially different regulatory regimes, with markedly different histories. As a result, even ILECs' present access rates lawfully and significantly exceed their reciprocal compensation rates (although, as historical subsidies in access rates diminish, the rates for local transport and termination services and for exchange access services should converge).[120] Therefore, we cannot focus merely on whether BTI's

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[114] Joint Statement at ¶ 31. *See* Amended Answer of Business Telecom, Inc. to AT&T Second Amended Complaint, AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-001 (filed Feb. 14, 2001) ("BTI Amended Answer to AT&T Complaint"), Exhibit 4.

[115] Joint Appendix, at Exhibit 2, Deposition of Peter J. Gose ("Gose Deposition"), at 202. AT&T Opening Brief, Exhibit 33.

[116] AT&T Opening Brief, Exhibit 33.

[117] AT&T Opening Brief at 17-19; Sprint Opening Brief at 23-28.

[118] *See* 47 U.S.C. § 251(b)(4).

[119] Joint Statement at ¶ 29, quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16012 (1996) ("*Local Competition Order*") (subsequent history omitted). *See* Sprint Complaint, Exhibit 12, Declaration of Kent W. Dickerson at ¶ 3.

[120] *Local Competition Order*, 11 FCC Rcd at 16012. Although our analysis utilizes a comparison of the disparities between access rates and reciprocal compensation rates for BTI and BellSouth, respectively, nothing in our discussion should be construed as an endorsement of any such disparity in rates. *See Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132, 2001 WL 455872, ¶ 5 (rel. Apr. 27, 2001) (seeking comment on reforming the existing access charge and reciprocal compensation regulations because, among other things, "[t]hese regulations treat different types of carriers and (continued....)

access rates exceed its reciprocal compensation rates, but must examine the magnitude of such disparity, and whether it exceeds the disparity between the competing ILEC's access and reciprocal compensation rates.

39. Here, BTI's reciprocal compensation rate in 2000 was the same as BellSouth's reciprocal compensation rate – less than 0.3 cents per minute – far lower than BTI's access rate of 7.1823 cents per minute.[121] Furthermore, in 2000, BTI's access rate was approximately 24 times higher than its reciprocal compensation rate, whereas BellSouth's access rate was only about 1.5 times higher than its reciprocal compensation rate.

40. BTI argues that its reciprocal compensation rate is not a fair basis for comparison, because its local transport and termination services and its exchange access services use different network functions.[122] But BTI's evidence fails to demonstrate that its network is substantially different from most other carriers' networks, which, as described above, the Commission has found use essentially the same functions to provide these two services.[123] BTI further argues that its decision to mirror BellSouth's reciprocal compensation rate was not an acknowledgement of the rate's reasonableness, but merely a pragmatic decision based on the regulatory cost of trying to seek a higher rate.[124] This actually bolsters the usefulness of the reciprocal compensation rate as a benchmark, however, at least in the absence of record evidence that BTI anticipated a traffic imbalance that would diminish the appeal of seeking asymmetrical compensation. If the cost of trying to obtain a higher rate exceeded the benefit of doing so, then BTI likely viewed the ILEC's rate as being close to on the mark.

41. BTI further contends that, if we use its reciprocal compensation rate as a benchmark, we will effectively require ILEC access rates to equal ILEC reciprocal compensation rates.[125] This contention mischaracterizes the nature of our comparison. As described above, we are not deeming relevant the mere existence of a rate differential, but rather examining the magnitude of the rate

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different types of services disparately, even though there may be no significant differences in the costs among carriers or services").

[121] The record does not contain any of the reciprocal compensation rates that BTI and GTE charged each other during the relevant time period. The record also does not contain the reciprocal compensation rates that BTI and BellSouth charged each other in 1998 and 1999.

[122] BTI Initial Brief at 22-25; BTI Reply Brief at 18.

[123] The record in this case supports the Commission's prior conclusion that the transport and termination of local calls between a CLEC and an ILEC involves the use of similar, if not identical, switching and transport facilities as the provision of interstate switched access services for long distance calls. *See* AT&T Opening Brief at Exhibit 23, Affidavit of John C. Klick ("Klick Affidavit") at ¶ 11; AT&T Opening Brief at Exhibit 1, Affidavit of William J. Taggart, III ("Taggart Affidavit") at ¶ 10; Sprint Complaint, Exhibit 12, Declaration of Kent W. Dickerson at ¶ 3; Joint Appendix, at Exhibit, 3, Pfaging Deposition at 55-77, 118-20.

[124] BTI Initial Brief at 24-25. A CLEC and an ILEC operating in the same area establish rates for reciprocal compensation through the negotiation and arbitration processes provided in sections 251 and 252 of the Act. 47 U.S.C. §§ 251-252. In the arbitration process, a state commission can order the ILEC to pay more than the CLEC (*i.e.*, "asymetrical compensation") only if the CLEC demonstrates that its costs for transporting and terminating local traffic exceed those of the ILEC. 47 C.F.R. § 51.711(b).

[125] BTI Initial Brief at 24.

differential and comparing it to the competing ILEC's rate differential.

3. BTI's Access Revenue-Sharing Practices Are Also Appropriate Marketplace Data on Which to Assess the Reasonableness of BTI's Access Rates.

42. Although BTI contends otherwise,[126] the record indicates that BTI offered certain of its customers a cash payment or credit of up to 24% of BTI's access revenues generated by the customers' toll traffic.[127] BTI's ability to share such a large portion of its access revenues with its customers is relevant in determining whether the level of BTI's access rates was just and reasonable.

4. The Foregoing Market Data Amply Indicate that BTI's Access Rates Were and Are Unjust and Unreasonable.

43. As described above, BTI's access rates greatly exceeded each relevant market benchmark during the applicable period, and BTI has failed to demonstrate any lawful reason for the huge disparities. First, BTI's access rates substantially exceeded its ILEC competitors' rates; and BTI has not demonstrated (1) any legitimate reason why it should escape the general economic principle that a new entrant's rates should not significantly exceed those of a primary incumbent; or (2) any material difference in its service offering, network architecture, or service quality that would explain such a rate differential. Second, BTI's access rates substantially exceeded both ILEC and CLEC industry averages; and BTI again has not demonstrated any material differences in its service offering, network architecture, or service quality that would explain such a rate differential. Third, BTI met or beat the rates of its competitors in the local exchange and long distance markets, but greatly exceeded the rates of its competitors in the access market; and BTI has proffered no legitimate explanation for its disparate pricing policies across markets. Fourth, BTI shared with certain of its customers up to 24% of the access revenues generated by the customers' toll traffic; and BTI has not explained how revenues from a truly reasonable access charge could profitably permit such arrangements. Finally, the differential between BTI's access rates and its reciprocal compensation rates was enormous – and far greater than BellSouth's differential; yet BTI has not demonstrated any material differences in its network functions, network architecture, or service quality that would explain such disparities.

44. All of these factors confirm what the Commission concluded in the *CLEC Access Charge Order* – that the access market in which BTI participates is not truly competitive, and that CLECs, such as BTI, possess market power with respect to access to their end users.[128] These factors also clearly reveal that the level of BTI's access rates derives from abuse of such market power. Consequently, we find that, taken together as a whole, these factors clearly demonstrate that BTI's access

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[126] BTI Initial Brief at 68. Joint Appendix, at Exhibit 3, Pflaging Deposition, Exhibit 7 at 1304-05.

[127] Joint Appendix, at Exhibit 3, Pflaging Deposition at 143-48; Joint Appendix, at Exhibit 3, Plfaging Deposition Exhibit 7, at 1302-06 (BTI's "Local Business Partner's Plan"). BTI's marketing materials clearly describe this program as "a product that pays the *customer* to use it" and as a means for its customers' toll-traffic to help the *customer* recapture lost revenue and pay for the cost of the customer's local and other telecommunications needs. *Id.* (emphasis added). Although BTI's current program offers customers a credit against BTI services, BTI previously offered the customers the option of receiving a cash payment. Joint Appendix, at Exhibit 3, Pflaging Deposition at 146-47.

[128] *CLEC Access Charge Order*, 2001 WL 431685, at ¶¶ 28, 31-34.

rate of 7.1823 cents per minute was and is unjust and unreasonable under section 201(b).

5. BTI's "Cost Showing" Does Not Justify Its Access Rates.

45. For the reasons described above, we agree with the parties that we should examine marketplace factors, rather than BTI's costs, to determine whether BTI's rate was and is just and reasonable.[129] BTI argues, however, that if we decline to adopt its version of a marketplace analysis, *i.e.*, whatever the market would bear was reasonable, then we must examine BTI's costs, after all.[130] As described above, we reject BTI's version of a marketplace analysis, but we do not believe that an examination of BTI's costs is either necessary or appropriate. However, even if such an examination were deemed necessary or appropriate, we would find with little difficulty that BTI's attempt to justify its rates on the basis of costs fails, for the reasons described below.

46. Before addressing BTI's cost-based defense, we reject BTI's contention that, as the parties seeking relief in this proceeding, Complainants bear the burden of showing that BTI's costs did *not* justify its rates, rather than BTI bearing the burden of showing that its costs *did* justify its rates.[131] Because BTI had exclusive possession of the information needed to assess its own costs,[132] and BTI pled cost-justification as an affirmative defense,[133] BTI bears the burden of proving the cost-basis of its access rates.[134]

47. To shoulder this burden, BTI submitted a "cost showing."[135] As an initial matter, we view BTI's cost showing with substantial skepticism, for several reasons. First, despite full knowledge of the exigencies created by the five-month statutory deadline applicable to these kinds of complaints, BTI repeatedly failed to comply with our rules regarding production of supporting information,[136] and

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[129] *See* Part III.B.1, *supra*.

[130] BTI Initial Brief at 34-35.

[131] BTI Initial Brief at 30-34.

[132] BTI Amended Answer to AT&T Second Amended Complaint at ¶ 28.

[133] BTI Amended Answer to AT&T Second Amended Complaint at ¶¶ 84-85; BTI Amended Answer to Sprint Complaint at ¶¶ 42-43.

[134] *See General Plumbing v. New York Tel. Co. and MCI Telecommunications Corp.*, Memorandum Opinion and Order, 11 FCC Rcd 11799, 11809 n. 63 (1996). *See also Environmental Defense Fund, Inc. v. Environmental Protection Agency*, 548 F.2d 998, 1014 (D.C. Cir. 1976).

[135] *See* Letter from Ronald J. Jarvis, Counsel for BTI, to David M. Miles, Counsel for AT&T, and Frank Krogh, Counsel for Sprint, AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-001 and Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002 (filed Feb. 20, 2001).

[136] For example, BTI's initial Answers to Complainants' Complaints were stricken without prejudice because of numerous failures by BTI to comply with the Commission's formal complaint rules regarding production of supporting information. *See* Letter from Anthony J. DeLaurentis, Attorney, Market Disputes Resolution Division, Enforcement Bureau, to Jonathan E. Canis, Counsel for BTI; James F. Bendernagel, Counsel for AT&T; and Cheryl A. Tritt, Counsel for Sprint (Feb. 12, 2001), AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-001 and Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002. BTI's Amended Answers also contained many of the same deficiencies as BTI's initial Answers, but were (continued....)

repeatedly failed to comply in a timely manner with Commission staff's discovery rulings.[137] Second, BTI's pricing practices for long distance services belie the assertion that its access services are cost-based.[138] Third, BTI offered certain of its customers a credit of up to 24% of BTI's access revenues generated by the customer's toll traffic.[139] BTI's ability to essentially share such a large portion of its access revenues with its customers further undermines the assertion that BTI's access rates were cost-based. Finally, because BTI admits that it did not examine its costs when it set its access rates in July 1998, it would appear to be a remarkable coincidence – but nothing more – if BTI were able to generate a cost analysis three years after the fact that justifies the previously selected rate.

48. In any event, BTI's cost justification is so riddled with conceptual flaws and factual errors as to be of minimal evidentiary value in assessing the cost basis of BTI's access rates. Although these deficiencies are too numerous to discuss in detail, the following examples demonstrate their

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accepted by Commission staff because of the time constraints resulting from the five-month statutory deadline applicable to these complaints. *See* Letter from Anthony J. DeLaurentis, Attorney, Market Disputes Resolution Division, Enforcement Bureau, to Jonathan E. Canis, Counsel for BTI; James F. Bendernagel, Counsel for AT&T; and Cheryl A.Tritt, Counsel for Sprint (Feb. 23, 2001), AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-001 and Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002.

[137] For example, despite staff rulings directing them to do so, BTI failed or refused to produce, among other things, documents collected and created by BTI's cost accounting group reflecting BTI's costs; documents reflecting the amounts BTI paid for facilities it owns or leases; documents reflecting BTI's margins on relevant revenue streams; bills sent by BTI to itself for access services; and documents relating to BTI's costs that were available to BTI personnel when they established BTI's access rates. *See* Letters from Anthony J. DeLaurentis, Attorney, Market Disputes Resolution Division, Enforcement Bureau, to Jonathan E. Canis, Counsel for BTI; James F. Bendernagel, Counsel for AT&T; and Cheryl A. Tritt, Counsel for Sprint (Feb. 23, 2001 and Mar. 5, 2001), AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-001 and Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002; Letter from James F. Bengernagel, Counsel for AT&T, to Jonathan E. Canis, Counsel for BTI (Feb. 26, 2001), AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-001 and Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002; Letter from James F. Bengernagel, Counsel for AT&T, to Anthony J. DeLaurentis, Attorney, Market Disputes Resolution Division, Enforcement Bureau (Mar. 13, 2001), AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-001 and Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002. *See also* Joint Appendix, at Exhibit 3, Pflaging Deposition at 10-11, 19-21, 58-60, 66-70, 74-76, 87-88, 98-100, 108-110, 130-31, 146-48, 168-71, 180-81, 196-200, 216-17, 219-20, 227-28, 260, and 238-40; AT&T Opening Brief at 34-35. BTI has filed an application for review of one of the Enforcement Bureau's rulings requiring BTI to produce certain customer information relied upon by its experts in support of BTI's cost showing. Application for Review of Business Telecom, Inc., AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-001 and Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002 (filed Apr. 4, 2001). Because we do not rely upon the presence or absence of the specified information, we hereby dismiss BTI's Application for Review as moot.

[138] AT&T Reply Brief at 28-29. In particular, although access is one – and only one – cost of providing long distance service, BTI priced its long distance service roughly at or below the price of its access service. If BTI's access rate were truly cost-based, BTI would have had to price its long distance service much higher in order to make a profit.

[139] Joint Appendix, at Exhibit 3, Pflaging Deposition at 143-48; Joint Appendix, at Exhibit 3, Pflaging Deposition, Exhibit 7, at 1302-06.

egregious nature.[140] BTI's purported switching expert, who admitted under oath that he was not an expert on switching,[141] failed to consider a number of relevant factors in assessing BTI's ability to utilize its switches efficiently.[142] He omitted such basic criteria as the actual cost for each of BTI's switches. In addition, BTI's capital costs analysis included a number of significant errors. For example, in calculating the cost of the debt component of BTI's capital structure, BTI's expert used the wrong interest rate for a $250 million bond offering.[143] When this error alone was corrected, BTI's expert's calculation of the cost of capital was reduced from 25 percent to approximately 18 percent.[144] Likewise, BTI's experts included BTI's marketing and advertising expenses, which accounted for 50 percent of BTI's common costs,[145] in their estimate of common costs that could be recovered through access services, without determining whether BTI expended any marketing expenses for access services.[146] During discovery, BTI's own expert conceded that including costs not attributable to a specific service in the rates for such service was an improper attribution.[147]

49. Nevertheless, even when viewed in the light most favorable to BTI, its cost showing, as described by its own expert, demonstrates, at best, that BTI's access costs "*may*" be "higher than the access charge costs of large ILECs," and that BTI's access costs "are more likely to approach those of smaller" ILECs.[148] Thus, there is hardly any record basis to conclude that BTI's costs exceeded those of its ILEC competitors at all, much less that such disparity justified an access rate 15 times greater than that of the competing ILEC.[149] Indeed, although the fundamental purpose of the cost showing was to

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[140] For fuller discussions of the cost showing's inadequacies, good sources are Complainants' briefs, which we find provide, by and large, a fair analysis. AT&T Opening Brief at 21-39; Sprint Opening Brief at 42-52; AT&T Reply Brief at 12-24.

[141] Joint Appendix, at Exhibit 1, Deposition of Warren R. Fischer ("Fischer Deposition"), at 74, 290.

[142] Joint Appendix, at Exhibit 1, Fischer Deposition at 290. AT&T Opening Brief at 23.

[143] AT&T Opening Brief, at Exhibit 23, Klick Affidavit at ¶ 25; AT&T Opening Brief at 27.

[144] AT&T Opening Brief, at Exhibit 23, Klick Affidavit at ¶ 25. *See also* Joint Appendix, at Exhibit 1, Fischer Deposition at 167-70, 189-90.

[145] *See* AT&T Opening Brief, at Exhibit 23, Klick Affidavit at ¶¶ 34-5.

[146] Joint Appendix, at Exhibit 1, Fischer Deposition at 226-27.

[147] Joint Appendix, at Exhibit 2, Gose Deposition, at 225. For example, when asked about the inclusion of various expenses in BTI's common costs, such as a $65,000 expense for the company Christmas party, BTI's expert replied: "The only thing I specifically excluded as being inappropriate was the corporate jet." Joint Appendix, at Exhibit 1, Fischer Deposition at 193-94.

[148] Letter from Ronald J. Jarvis, Counsel for BTI, to Magalie Roman Salas, Secretary, Federal Communications Commission, attaching Affidavit of Peter J. Gose, AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-110 and Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002 (filed Feb. 23, 2001) ("Gose Affidavit") at ¶ 21 (emphasis added).

[149] Although BTI acknowledges that its "cost showing" has problems, it blames Commission staff for not allowing it additional time to complete a more comprehensive "cost study." BTI Initial Brief at 30-31; BTI Consolidated Reply Brief at 30-31. For the reasons previously stated in these proceedings, we categorically reject BTI's assertion that any flaws in BTI's cost justification defense derive from Commission staff's imposition of the strict schedule needed to allow us to comply with the five-month statutory deadline applicable to this kind of (continued....)

demonstrate the cost justification of BTI's access rates, neither of BTI's experts ever stated unequivocally – in either their affidavits or their depositions – that BTI's costs justified its access rate of 7.1823 cents per minute.[150]

50. In sum, we find that BTI's cost showing, even when reviewed in the light most favorable to BTI, does little more than suggest that BTI's access costs *might* exceed those of BellSouth or GTE by some indeterminate, small amount. Thus, we conclude that, even if it were relevant, BTI's cost showing would fall far short of cost-justifying its access rate of over 7 cents per.minute.

6. AT&T Is Not Estopped From Challenging BTI's Access Rates.

51. BTI asserts as an affirmative defense that we should equitably estop AT&T from challenging BTI's access rates because ACC Corp. ("ACC"), AT&T's wholly owned CLEC subsidiary, allegedly charges even higher access rates than BTI.[151] In support of this affirmative defense of equitable estoppel,[152] BTI contends that ACC charges exchange access rates of nearly 9 cents per minute to IXCs other than AT&T.[153]

52. We conclude that BTI's estoppel argument fails as a matter of law. BTI did not properly plead the essential elements of estoppel in its Amended Answer.[154] The Commission has repeatedly held that, in order to invoke equitable estoppel to preclude a party from asserting a right he would otherwise possess, but has forfeited because of his conduct, "[t]he aggrieved party must have justifiably *relied* upon such conduct and *changed* his position so that he will suffer injury if the other is allowed to repudiate his

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complaint under section 208(b)(1) of the Act. 47 U.S.C. § 208(b)(1). *See* Letter Ruling from Anthony J. DeLaurentis, Attorney, Market Disputes Resolution Division, Enforcement Bureau, to Jonathan E. Canis, Counsel for BTI; James F. Bendernagel, Counsel for AT&T; and Cheryl A. Tritt, Counsel for Sprint, AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-001 and Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002 (Feb. 15, 2001).

[150] *See* Gose Affidavit at ¶ 21; *see also* Letter from Ronald J. Jarvis, Counsel for BTI, to Magalie Roman Salas, Secretary, Federal Communications Commission, attaching Affidavit of Warren R. Fischer, AT&T Corp. v. Business Telecom, Inc., File No. EB-01-MD-110 and Sprint Communications Company, L.P. v. Business Telecom, Inc., File No. EB-01-MD-002 (filed Feb. 23, 2001) ("Fischer Affidavit") at ¶¶ 24-26.

[151] BTI Amended Answer to AT&T Second Amended Complaint, ¶¶ 70-71; BTI Initial Brief at 14-15.

[152] Although BTI affirmatively pled "equitable estoppel" in its Amended Answer, it modified this legal argument in its Initial Brief to a "quasi-estoppel" argument. BTI Amended Answer to AT&T Second Amended Complaint, at ¶¶ 35, 54-55, 70-71; BTI Initial Brief at 14-15; BTI Reply Brief at 31-34. Our conclusion is the same under either legal theory, however.

[153] BTI Initial Brief at 14. BTI also contends that ACC charges AT&T the competing ILEC access rate rather than the tariffed rate. BTI Amended Answer to AT&T Second Amended Complaint, ¶ 26.

[154] In any event, BTI's attempt to plead an estoppel defense in its Amended Answer does not comply with the Commission's rules, *see* 47 C.F.R. §§ 1.724(b), 1.720(b), because BTI failed to cite any legal authority supporting the affirmative defense and failed to allege and provide evidentiary support for facts which, if true, would establish an estoppel defense. *See* BTI Amended Answer to AT&T Second Amended Complaint, ¶ 70-71.

conduct."[155] BTI made no such showing in either its Amended Answer or its briefs. Thus, the record is devoid of evidence that BTI relied upon AT&T's or ACC's conduct in any way in setting its access rates or that, because of AT&T's or ACC's actions, BTI changed its behavior in a manner that caused it harm.

C. The Lawful Per-Minute Access Rate for Purposes of Calculating Damages Ranges From 3.8 Cents to 2.7 Cents During the Relevant Period.

53. We conclude above that BTI's access rate of 7.1823 cents per minute was and is unjust and unreasonable under section 201(b) of the Act. Consequently, we must determine what a reasonable rate would have been during the relevant period so that the court may calculate Complainants' damages arising from BTI's violation of section 201(b). In this regard, we note that neither side has provided much in the way of useful guidance on what a reasonable rate would have been. In particular, BTI has contented itself with bald assertions that, because its rate appeared in a filed tariff, the rate was necessarily reasonable. BTI has failed to include in the record any factors or useful analogies that could guide our consideration of what rate other than 7.1823 cents per minute would have been a reasonable rate during the time period at issue. On the other hand, the Complainants have restricted themselves to asserting that the competing ILEC rate is the only alternative for a reasonable rate. These record deficiencies, combined with the absence of clear CLEC access pricing rules during the relevant period, make the task of establishing a specific benchmark rate for calculating damages a challenging one.

54. We recently determined in the *CLEC Access Order* that, in a properly functioning competitive market, CLECs would charge no more for their access services than do the ILECs with which they compete. Nevertheless, because of the lack of clear regulatory guidance on the pricing issue, and because of concerns about industry dislocations resulting from a flash-cut to the ILEC rate, the Commission established a declining benchmark to define the reasonableness of CLEC rates in the future.[156] The lack of clear rules to guide previous CLEC access rates similarly motivates us here – in seeking to achieve fairness in hindsight – to adopt as reasonable a rate somewhat above that charged by the competing ILEC during the relevant period.[157]

55. To determine the level of that rate, and faced with the gaping holes in this record, we find substantial guidance in the *CLEC Access Charge Order*'s determination that, for a year after its issuance, a rate of up to 2.5 cents per minute will be presumptively reasonable for CLEC access.[158] Nothing in this record indicates that the considerations bearing on rate reasonableness during the retrospective period at issue here were markedly different from the circumstances the Commission

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[155] *See Bell Atlantic Delaware, et al. v. Global NAPS, Inc.*, Memorandum Opinion and Order, FCC No. 00-383, 2000 WL 1593346, ¶ 17 (Oct. 26, 2000); *NextWave Personal Comm, Inc.*, Order on Reconsideration, 15 FCC Rcd 17500, 17515 at ¶ 28 (2000); *Communique Telecommunications, Inc.*, Declaratory Ruling and Order, 10 FCC Rcd 10399, 10404 at ¶ 30 (Com. Car. Bur. rel. May 25, 1995).

[156] *CLEC Access Charge Order*, 2001 WL 431685, at ¶¶ 52-53.

[157] This approach comports with *Sprint v. MGC*, wherein the Commission ruled that, during some of the same period at issue here, a CLEC's access rate was not *per se* unreasonable solely because it exceeded the competing ILEC's access rate.

[158] Over the course of the three subsequent years, subject to certain qualifications, the presumptively reasonable tariffed rate drops to the rate of the competing ILEC. *See CLEC Access Charge Order*, 2001 WL 431685, at ¶ 52.

considered in setting prospective tariff benchmarks. Thus, the record in this proceeding provides no basis for concluding that a reasonable rate for the damages period should diverge greatly from 2.5 cents per minute. We note, however, that during the three-year period at issue in this proceeding, access rates generally declined due to a variety of Commission initiatives.[159] Accordingly, we conclude that a reasonable access rate for BTI to have charged back in 1998, 1999, and 2000, should be at least marginally higher than the 2.5 cents that we have determined to be reasonable prospectively.

56. Here again, the record provides little guidance in determining the level of this marginal difference. To determine the path that BTI's reasonable rate should have followed, therefore, we look to the rates of the only alternative category of carriers that the record provides any basis for viewing as even arguably similar to BTI. In a context unrelated to damages, BTI argued that it somewhat resembles a small ILEC.[160] The record demonstrates that BTI had about 125,000 access lines, scattered throughout approximately 12 urban or concentrated areas, and lacked the resources of larger ILECs.[161] Based on this evidence, which is all the record provides on point, we conclude that, although the "fit" is far from exact, BTI bears at least some resemblance to a small, urban ILEC, given its size, business operations, and service areas.

57. Many such small ILECs operating in concentrated areas participate in the National Exchange Carriers Association ("NECA") tariffs, and they generally fit into the lowest rate band in NECA's tariff.[162] Therefore, although BTI did not and does not qualify to participate in NECA tariffs, in the absence of any record evidence suggesting an alternative damages methodology consistent with our liability finding, and in light of the fact that the five-month statutory deadline precludes a supplemental briefing period, we find that the changes in these low-band NECA rates over the past three years is instructive on the question of how a reasonable rate for BTI should have declined over the same period.

58. In 1998, 1999, and 2000, the lowest NECA rate band for access services was approximately 3.8, 3.0, and 2.7 cents per minute, respectively.[163] We note that this declining path provides a final rate that is very close to the 2.5 cents per minute that is deemed reasonable on a prospective basis in the *CLEC Access Charge Order*. Accordingly, solely for purposes of calculating

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[159] *See* Industry Analysis Division, Federal Communications Commission, TRENDS IN TELECOMMUNICATION SERVICE (December 2000), Table 1.2. This information is publically available in the Federal Communications Commission's Information Center at 445 12th Street, N.W., Washington, D.C. 20554 and at <http://www.fcc.gov/ccb/stats>.

[160] BTI Initial Brief at 47-55.

[161] *See* Part II.A, *supra*; *see also* Joint Appendix, at Exhibit 3, Pflaging Deposition at 129.

[162] *Cf.*, AT&T Opening Brief, Exhibit 22.

[163] *See* National Exchange Carrier Association, Inc., Tariff F.C.C. No. 5. This information is publicly available at the Federal Communications Commission's Electronic Tariff Filing System located on the Commission's E-Filing website located at <http://www.fcc.gov>. These rates derive from the average of the originating and terminating access rates for the following access rate elements in the lowest rate band of NECA's tariff filings effective January 1, 1999, January 1, 2000, and January 1, 2001: access tandem (facility), access tandem (termination), access tandem (switching), carrier common line charge (originating), carrier common line charge (terminating), local switching, information surcharge, transport interconnection charge, and common multiplexing. *See CLEC Access Charge Order*, 2001 WL 431685, ¶ 55 and n.126.

damages in this proceeding, we find that the just and reasonable rates for both originating and terminating access services during the relevant time period are as follows:[164]

- July 1, 1998 through June 30, 1999 — 3.8 cents per minute
- July 1, 1999 through June 30, 2000 — 3.0 cents per minute
- July 1, 2000 through the release date of this order.[165] — 2.7 cents per minute

59. We emphasize, however, that this tool for calculating damages here should not be taken as a finding, as a general matter, that CLECs are similar to low-band NECA carriers or that such NECA rates would be appropriate on a prospective basis. To the contrary, the *CLEC Access Charge Order* determined, based on a full record and numerous competing considerations, what presumptively reasonable CLEC access rates will be in the future. We adopt the proxy of low-band NECA carriers here only for the purpose of defining the retrospective path that BTI's reasonable rate should have followed, given the dearth of record information on the question.

D. AT&T Is Not Entitled to Additional Relief Under Section 254(k) of the Act.

60. AT&T argues that BTI violated section 254(k) of the Act by using the revenues derived from its high access rates to cross-subsidize BTI's efforts to compete in the provision of local and long distance services.[166] AT&T contends that this cross-subsidization is evidenced by the enormous disparity between (1) the high level of BTI's access rates in relation to the rates of competing access providers, and (2) the low level of BTI's rates for competitive local and long distance services in relation to the rates of competing local and long distance service providers.[167] AT&T further contends that BTI's calling plans that use the revenues earned by BTI's provision of access service to lower the price of BTI's competitive services to its end users are an explicit cross-subsidy.[168] In response, BTI contends that AT&T's claim fails as a matter of law, because the exchange access market is "competitive" within

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[164] Because BTI's initial tariff was filed with the Commission in July 1998, we align the yearly time periods for purposes of calculating damages to correspond with the effective date of the annual access tariff filings of price-cap carriers pursuant to Commission rules. 47 C.F.R. § 69(h). In setting a just and reasonable rate for purposes of calculating damages, we decline to set specific rates for originating and terminating access or for each of BTI's access elements. Rather, the rate chosen reflects the total amount that BTI could have lawfully charged per access minute for the local switching, transport termination, and transport mileage associated with providing originating and terminating access services. This approach is consistent with the Commission's recent limitation on the total access charges CLECs may tariff. *CLEC Access Charge Order*, 2001 WL 431685, at ¶ 55.

[165] We do not prescribe a rate for the future, as Complainants requested, because the *CLEC Access Charge Order* will govern BTI's future conduct.

[166] AT&T Second Amended Complaint, ¶¶ 36-42. AT&T Opening Brief at 48. Section 254(k) of the Act provides, in pertinent part: "A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition." 47 U.S.C. § 254(k).

[167] AT&T Second Amended Complaint, ¶¶ 37-41. AT&T Opening Brief at 46-52; AT&T Reply Brief at 25-30.

[168] AT&T Opening Brief at 48-52.

the meaning of section 254(k), and the Commission has never found otherwise.[169] BTI further argues that there is no evidence that its rates for competitive services are at below-cost levels, or that BTI actually used revenues from its access services to offset the costs of its other services.[170]

61. BTI is subject to section 254(k)'s prohibition against cross-subsidization.[171] However, in light of our ruling in Part III C. above, which effectively reduces BTI's access rate by approximately half during the entire period at issue, AT&T's claim for relief under section 254(k) fails for insufficient evidence. In particular, although AT&T submitted evidence that might have supported a conclusion that revenues derived from an access rate of over 7 cents per minute subsidized BTI's competitive services, such evidence does not support a conclusion that revenues derived from an access rate of approximately half of BTI's rate would have been sufficient to do so. Therefore, by limiting BTI's ability to recover access revenues from AT&T to the lower rates specified herein, AT&T has received all of the monetary relief to which it is entitled on this record. Accordingly, we decline to provide what would be merely an advisory opinion on the lawfulness of BTI's conduct under section 254(k). Therefore, we deny AT&T's claim under section 254(k).

IV. ORDERING CLAUSES

62. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201(b), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), and 208, that Count I of AT&T's Second Amended Complaint and Counts I, II, and III of Sprint's Complaint ARE GRANTED as against defendant BTI to the extent described herein, and are in all other respects DENIED.

63. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 208, and 254(k) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 208, and 254(k), that Count II of AT&T's Second Amended Complaint IS DENIED as against defendant BTI.

64. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 201(b), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), and 208, that BTI's tariffed switched access rate per minute as specified in paragraph 4, *supra*, WAS AND IS UNJUST AND UNREASONABLE in violation of section 201(b) of the Communications Act.

65. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 201(b), 207, 208, and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), 207, 208, and 209, that BTI's tariffed switched access rate per minute for access services, for purposes of calculating damages during the relevant time period, are the rates specified in paragraph 58, *supra*.

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[169] BTI Initial Brief at 26-30, 63-68; BTI Reply Brief at 51-54.

[170] BTI Initial Brief at 26-30.

[171] *Implementation of Section 254(k) of the Communications Act of 1934, as Amended*, Order, 12 FCC Rcd 6415, 6421 (1997).

66. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i),154(j), and 208, and section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, that BTI's Motion to Dismiss and Application for Review are DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

DISSENTING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

***RE: AT&T CORP. V. BUSINESS TELECOM, INC.; SPRINT COMMUNICATIONS COMPANY, L.P. V. BUSINESS TELECOM, INC.*, MEMORANDUM OPINION AND ORDER, FILE NOS. EB 01-MD-001 & EB-01-MD-002.**

Until April of 2001, the Commission had no rules in effect governing CLEC access charges. Instead, the Commission explicitly stated that such charges should be set by the market. *See, e.g., Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶ 361 (1997); *see also* Order ¶ 18. Nevertheless, in today's order, the Commission holds that for a period of time between 1998 and 2000, the access charges assessed by Business Telecom, Inc. ("BTI") were "unjust and unreasonable under section 201(b)" of the Communications Act of 1934. Order ¶ 1. The Commission comes to this conclusion through a purported "market-based" approach – an approach that largely ignores the actual market for exchange access, but instead looks at particular, mostly regulated rates in other markets – to determine how BTI should have priced its access charges were market failures in the access charge market "correct[ed] retroactively." Order ¶ 22 (internal quotation marks omitted). The Commission then holds that BTI is liable for roughly the difference between its rates and what it should have charged in a properly functioning market. *See* Order ¶ 53. I respectfully dissent.

First, the Commission's purported "market-based" approach has no basis in law or logic. Rather than look at the actual rates set in the access charge market, the Commission looks at isolated examples of other rates for other services, most of which are set by regulation, to determine how the market should have set access charge rates. This methodology is, on its face, in direct conflict with the very idea of market-based rates.

Second, the Commission failed to provide BTI any notice that its access charges would be retroactively judged according to the standard announced in this order. To the contrary, the Commission invited BTI and other CLECs to use the market to set rates, an invitation that necessarily sanctioned the use of any rate-setting methodology, or, indeed, no methodology at all. Moreover, to add insult to injury, the particular rate-setting methodology adopted here – which refuses to examine BTI's costs (order ¶ 44) – is directly at odds with the Commission's decision in *Sprint Communications Company, L.P. v. MGC Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd. 14027 (2000). In that decision, the Commission held that CLEC access charges higher than ILEC charges are not necessarily unreasonable, in part, because "a review of the reasonableness of a CLEC's rates [may] depend[] on a carrier-specific review of the costs of providing service." *Id.* ¶ 6.

This failure to provide BTI any notice of the rate-setting standard that would govern its liability retroactively renders the Commission's order legally suspect at best. Indeed, I am unaware of *any* decision in the history of the Commission in which damages were awarded for unreasonable rates when there were in effect *no rules governing how rates should be set*. Accordingly, I dissent.

EXHIBIT 34

2017 WL 5237210 (F.C.C.)

Federal Communications Commission (F.C.C.)
Memorandum Opinion and Order

IN THE MATTER OF AT&T CORP., COMPLAINANT
v.
IOWA NETWORK SERVICES, INC. D/B/A AUREON NETWORK SERVICES, DEFENDANT

Proceeding Number 17-56
Bureau ID Number EB-17-MD-001
FCC 17-148
Released: November 8, 2017
Adopted: November 7, 2017

***1** By the Commission:

I. INTRODUCTION

1. Complainant AT&T Corp. (AT&T) alleges that Iowa Network Services, Inc. d/b/a Aureon Network Services (Aureon) violated Sections 201(b) and 203 of the Communications Act of 1934, as amended (Act), in charging AT&T for Centralized Equal Access (CEA) service on traffic destined for competitive local exchange carriers (CLECs) engaged in "access stimulation." [1] In this Memorandum Opinion and Order, we grant AT&T's Complaint in part. We conclude that Aureon is subject to the Commission's rate cap and rate parity rules and that it violated those rules by filing tariffs containing rates exceeding those prescribed by the Commission. We will determine in the damages phase of this proceeding what Aureon's rates should have been and whether refunds to AT&T are warranted. [2] We further order Aureon to revise its tariff to file rates that comply with the Commission's rules. We otherwise disagree with AT&T's assertions that Aureon acted unlawfully.

II. BACKGROUND

A. Parties

2. AT&T provides communications and other services, including interexchange or long distance services. [3] As a long distance telephone company— otherwise known as an interexchange carrier (IXC)—AT&T provides telecommunications services enabling customers from one local exchange area to call customers in other local exchange areas. [4] In general, AT&T offers its long distance telephone service to the public for a fee, collects revenue from the customers that place calls, and in some circumstances, pays a charge to other carriers for the use of their facilities. [5]

3. One such carrier is Aureon. AT&T is a customer of Aureon and uses Aureon's network to complete certain calls for AT&T's customers. [6] A group of small, rural incumbent local exchange carriers (ILECs) founded Aureon in 1988 to provide CEA service. [7] Aureon's various divisions provide a wide variety of telecommunications, advanced, and other services. [8] Aureon provides its CEA service through its Access Division. [9]

B. CEA Service

4. Local exchange carriers have traditionally been required to provide "equal access" service to long distance carriers. [10] "Equal access" refers to a "class of service whereby all long distance service providers receive equivalent connections to the local exchange carrier's network." [11] "1+ dialing" is an equal access feature that automatically directs all long distance numbers to the customer's chosen (or "presubscribed") long distance carrier. [12] Historically, equal access was not available because all 1+ calls were routed to AT&T, the then-dominant long distance provider. [13] Imposed as part of the 1982 divestiture of AT&T, equal access obligations promoted long distance competition by enabling customers to reach AT&T's competitors by dialing the same number of digits needed to reach AT&T. [14]

***2** 5. In the 1980s, many switches of small, rural ILECs could not provide service to more than one long distance carrier on a 1+ basis. [15] These small, rural ILECs claimed that they lacked the financial ability to upgrade or replace their existing switches to provide equal access. [16] They further maintained that, because of the low volume of traffic from each individual ILEC, IXCs would be unwilling to incur high costs to construct the facilities needed to interconnect long distance networks directly to ILECs' end office switches. [17] In some states, groups of small, rural ILECs sought to address these issues by forming entities to provide CEA service. [18] CEA service enables IXCs to complete their customers' long distance telephone calls, without building their own networks, by connecting the IXCs' facilities to a centralized switch and network operated by the CEA provider. [19] The CEA provider, in turn, connects with local exchange carrier (LEC) networks at various points of interconnection (POIs). [20]

6. In 1988, the Commission authorized Aureon to provide CEA service for both originating and terminating traffic in Iowa. [21] Aureon does not serve end users. [22] Rather, it serves IXCs, enabling them to deliver long distance traffic to approximately 200 LECs that subtend Aureon's network. [23] In accordance with routing guidelines provided by LECs, AT&T sends traffic to Aureon's network for routing to LECs connected to Aureon's network. [24] Not every LEC operating in Iowa subtends Aureon's network, however. [25] Where a LEC does not subtend Aureon's network, AT&T sends calls to that LEC's Iowa customers through a network provider other than Aureon. [26]

C. The Commission's Access Tariff Regime and Intercarrier Compensation Reforms

7. The Commission's tariff regime for switched access charges differs for dominant carriers and non-dominant carriers, ILECs and CLECs. [27] ILECs, as dominant carriers, [28] are required to file and maintain tariffs either as rate-of-return or price-cap carriers. [29] Rate-of-return dominant carriers can participate either in the traffic-sensitive tariff filed annually by the National Exchange Carriers Association (NECA) [30] or file their own tariffs under rule 61.38 or 61.39. [31] Historically, such carriers have set their tariffed interstate switched access rates at a level designed to give carriers an opportunity to recover their operating costs plus an authorized rate of return on the regulated rate base (plant in service minus accumulated depreciation). [32] Competitive access providers were classified as nondominant, [33] and, as such, are not required to file cost support. [34]

8. The Telecommunications Act of 1996 created its own dichotomy of local exchange carriers—ILECs and CLECs. [35] Carriers (including all ILECs) that were subject to dominant carrier regulation remained as such and new entrants in the exchange access market (including most CLECs) were subject to nondominant regulation. [36] Responding to substantial disputes regarding nondominant carrier switched access charges, the Commission in 2001 held that non-dominant CLECs could provide an IXC with, and charge for, interstate switched access services in one of two ways. [37] First, a CLEC may tariff interstate switched exchange access charges if its rates are no higher than the rates charged for such services by the competing ILEC (the benchmark rule). [38] Second, as an alternative to tariffing switched exchange

access services, a CLEC may negotiate and enter into an agreement with an IXC to charge rates higher than those permitted under the benchmark rule. [39]

***3** 9. In 2011, the Commission comprehensively reformed and modernized its intercarrier compensation regime to facilitate the transition to Internet Protocol-based networks and curtail wasteful arbitrage. [40] In particular, the Commission adopted a uniform national bill-and-keep framework as the ultimate end state for all telecommunications traffic exchanged with a LEC. [41] Under a bill-and-keep arrangement, carriers look first to their subscribers to cover the costs of the network, then to explicit universal service support where necessary. [42] The Commission immediately capped *all* interstate switched access rates, as well as many intrastate rates, effective as of the date of the rules, [43] and mandated that LECs reduce their terminating intrastate access rates to the level of their interstate rates by July 1, 2013. [44] For CLECs, the Commission reaffirmed benchmarking as the main means of ensuring reform. [45] The Commission also established a schedule by which many interstate and intrastate terminating access rates would be reduced to bill-and-keep. [46] The Commission imposed these caps and prescribed reductions regardless of the resulting rate of return on investment relating to the affected services. [47]

10. In addition, the Commission promulgated new rules to address access stimulation. [48] Access stimulation occurs when a LEC with high switched access rates (1) enters into an arrangement with a provider of high call volume operations —typically, "free" chat line or conference calling companies (FCPs)—to stimulate the access minutes terminated to the LEC; and (2) shares a portion of the increased access revenues resulting from the increased demand, or some other benefit, with the FCP. [49] The Commission concluded that access stimulation is an arbitrage scheme that is wasteful, imposes undue costs on consumers, and harms competition. [50] To curtail this practice, the Commission adopted a rule that prohibits CLECs engaged in access stimulation from filing a tariff for their interstate exchange access services above the rate prescribed in the access tariff of the price cap ILEC with the lowest switched access rates in the state. [51]

D. Aureon's CEA Tariff and Proposed High-Volume Tariff

11. Aureon's Access Division provides CEA service and, as to that service, Aureon is classified as a dominant carrier. [52] Aureon filed its tariffed rates for CEA service under Section 61.38 of the Commission's rules. [53] Specifically, INAD Tariff F.C.C. No. 1 (Tariff) is captioned "Centralized Equal Access Service" and contains the "regulations, rates and charges applicable to the provision of Switched Access Services and other miscellaneous services ... provided by [Aureon] ... to customers." [54] Although the Tariff capitalizes the phrase "Centralized Equal Access Service" and uses it on the title page and as a caption on each page of the Tariff, the Tariff does not define the term. [55] Aureon charges for interstate CEA service using a single tariff rate called the "switched transport rate," which is non-distance sensitive and recovers the costs of both transport and tandem switching. [56] When Aureon first filed the Tariff on August 10, 1988, [57] the switched transport rate was $0.0117 per minute. [58] On December 29, 2011, when the Commission's rate cap went into effect, the switched transport rate was $0.00819 per minute. [59] Aureon reduced the per-minute rate to $0.00623 in June 2012, and increased the rate to its current level of $0.00896 in June 2013. [60]

***4** 12. In April 2017, Aureon proposed providing a separate, high-volume contract tariff service. [61] This service would be subject to a lower rate ($0.00649 per minute), and purchasers would be required to sign a separate contract with Aureon and agree not to challenge any of Aureon's rates. [62] According to Aureon's filing, "additional terms and conditions that are not applicable to [CEA service]" would govern the high-volume service. [63] Aureon delayed the effective date of its proposed high-volume tariff filing until the Commission could review the proposal. [64] One month

later, Aureon filed an application for special permission to withdraw the proposed service and to substitute a new "volume discount" plan that would have the same rate as the proposed high-volume contract service and similarly would require execution of a separate service agreement. [65] The volume discount plan became effective on May 20, 2017. [66] Aureon has not negotiated an access services agreement with AT&T, however. [67]

E. The Parties' Dispute

13. AT&T provides long-distance services to customers in Iowa and purchases Aureon's services to complete calls. [68] In recent years, AT&T has seen a greatly increasing amount of alleged access stimulation traffic traverse its network in Iowa, for which it must pay access charges both to Aureon (for tandem and transport services to the subtending LECs' POIs), [69] and to the subtending LECs (for transport from their POIs to their switches and for end office switching services) [70] that terminate the calls. [71] Aureon estimates that, over time, traffic owing to its subtending LECs engaged in access stimulation has amounted to roughly **[BEGIN CONFIDENTIAL] *** [END CONFIDENTIAL]** of its total switched access service traffic. [72]

14. Aureon has sent monthly invoices to AT&T for access service. [73] AT&T fully paid Aureon's August 2013 invoice and previous invoices for access service. [74] In October 2013, AT&T disputed Aureon's billed access service charges and began withholding payment on access charges it claims were being improperly billed by Aureon. [75] AT&T has not fully paid Aureon's September 2013 invoice and subsequent invoices. [76]

15. On May 30, 2014, Aureon filed a complaint against AT&T in the United States District Court for New Jersey alleging that AT&T breached Aureon's federal and state tariffs. [77] AT&T filed counterclaims against Aureon alleging various violations of the Act. [78] On July 6, 2015, AT&T filed a letter with the District Court raising the issue of the primary jurisdiction doctrine. [79] In an Order dated October 14, 2015, the District Court stayed the case and referred it to the Commission pursuant to that doctrine. [80] In August 2016, the parties notified the Commission of the District Court's referral. [81] In a September 27, 2016, Letter Ruling, the Commission ordered AT&T to file a Formal Complaint to effectuate the District Court's referral. [82]

***5** 16. On June 8, 2017, AT&T filed its Complaint with the Commission. [83] The Complaint asserts two counts: Count I, for violation of Section 201 of the Act, [84] and Count II, for violation of Section 203 of the Act. [85] Specifically, AT&T argues that (1) the Tariff applies only to CEA service, which it argues does not include access stimulation traffic; [86] (2) Aureon violated the Commission's rate cap and rate parity rules by raising its CEA tariffed rate in 2013 and by not ever lowering its intrastate CEA rate; [87] (3) Aureon is engaged in access stimulation but has not filed revised tariffs to conform its rates to the lower levels that the Commission has required for such traffic; [88] and (4) Aureon manipulated its CEA rates through a variety of improper accounting measures. [89] Aureon filed an answer on June 28, 2017, denying the allegations of wrongdoing and asserting various affirmative defenses. [90] AT&T submitted a Reply to the Answer on July 5, 2017. [91]

III. DISCUSSION

A. Aureon Did Not Violate Sections 203 and 201(b) of the Act by Billing at its CEA Tariff Rate for Traffic Terminating with Access Stimulators.

17. AT&T contends that Aureon violated Section 203 of the Act and committed an unreasonable practice in contravention of Section 201(b) of the Act by billing AT&T for access stimulation traffic, because access stimulation traffic is not CEA traffic under the Tariff. [92] The Tariff is titled "Centralized Equal Access Service," and that phrase appears as a caption throughout the Tariff. [93] Nonetheless, the Tariff does not define the term. [94] AT&T argues that the Commission should infer the term's definition from other authority, and that the definition must exclude the provision of access services on access stimulation traffic. [95] We are unpersuaded by AT&T's arguments. As discussed below, we conclude that the service Aureon provided to AT&T is the service that the Tariff describes. Therefore, Aureon appropriately billed AT&T under the Tariff. [96]

18. Section 1 of the Tariff states that it contains the "regulations, rates and charges applicable to the provision of Switched Access Services and other miscellaneous services ... provided by [Aureon] ... to customers." [97] The Tariff provides that "Switched Access Service, when combined with the services offered by Exchange Telephone Companies, is available to Customers." [98] The Tariff later describes the technical characteristics of Switched Access Service as follows:
[Aureon] provides a two-point electrical communications path between a point of interconnection with the transmission facilities of an Exchange Telephone Company at a location listed in Section 8 following and Iowa Network's central access tandem where the Customer's traffic is switched to originate or terminate its communications. It also provides for the switching facilities at [Aureon's] central access tandem. [99]

***6** Although the provisions of Section 1 of the Tariff are captioned ""Application of Tariff," AT&T contends that they "do not address the scope of [[Aureon's] Tariff." [100] Rather, AT&T says that Section 1 "merely confirms that CEA service is a type of switched access service and describes the functions that [Aureon] will perform in connection with legitimate CEA traffic." [101] However, nothing in the language of the Tariff restricts its application to what AT&T calls "legitimate" CEA traffic (i.e., access traffic that is not bound for access stimulators). [102] Indeed, there is no mention at all of traffic being categorized in the way AT&T suggests. Nor do the references to "Centralized Equal Access Service" on the Tariff's title page and on the individual pages of the Tariff render the scope of the Tariff any different from that described with particularity in the "Application of Tariff" provisions. The specific provisions of the Tariff prevail over general provisions and headings. [103] Aureon indisputably provided Switched Access Service in the manner delineated in the Tariff when it routed the calls AT&T sent to the LECs that subtend Aureon's network. [104] Consequently, Aureon did not violate Section 201(b) or 203 of the Act when it charged AT&T under the Tariff for the traffic Aureon delivered. [105]

19. AT&T argues that CEA service "was approved for the limited purpose of facilitating the provision of equal access service to small, rural LECs carrying very low traffic volumes" [106] and that "access stimulation traffic has virtually nothing in common with legitimate CEA traffic." [107] As an initial matter, AT&T overstates its claim concerning the "limited purpose" of the CEA service. The order authorizing a CEA network in Iowa states—and subsequent authority reaffirms—that Aureon's CEA network also would serve to "speed the availability of high quality varied competitive services to small towns and rural areas." [108] Further, AT&T's allegation that CEA networks were intended to carry low traffic volumes is of little weight since, as a Section 61.38 carrier, Aureon's calculated rates should decrease to reflect the increase in the volume of traffic. [109] In any event, we acknowledge that, at the time the Commission authorized Aureon to operate its CEA network, the Commission could not have anticipated the subsequent emergence and rapid growth of access stimulation arrangements. But in this adjudication, we must evaluate Aureon's conduct under existing rules and orders, along with the terms of its Tariff. Regardless of how access stimulation traffic compares in character and volume to the types of traffic that were originally anticipated for CEA service, we find that Aureon has acted lawfully and consistently with its Tariff in transporting access stimulation traffic. AT&T claims that Aureon's recent filing of a proposed high-volume traffic contract tariff shows that the Tariff does not cover access stimulation traffic. [110] But, as

AT&T acknowledges, Aureon withdrew this filing, [111] and we will not rely on its language to circumscribe the scope of Aureon's existing Tariff. In any event, Aureon's proposed tariff did not purport to apply to high volumes of access traffic except in specific circumstances not present here. For example, the proposed tariff required the presence of a contract and a buyer who had not previously purchased CEA service. [112] Here, neither AT&T nor Aureon alleges that a relevant contract exists between them, and AT&T has purchased CEA service from Aureon for many years.

***7** 20. Contrary to AT&T's contention, changes in the nature of Aureon's network traffic and customer base over time have not exceeded the scope of Aureon's Section 214 authorization. [113] Aureon's original Section 214 authorization required Aureon to obtain "Section 214 authority prior to acquiring and operating any interstate lines of communications" and denied Aureon's general request for "Section 214 authority to serve ITCs [independent telephone companies] that may choose to utilize its services in the future." [114] In 1999, however, the Commission enacted revised rules conferring Section 214 authorization for new lines of all domestic carriers, so that no applications need be filed, and "codif[ied] the statutory exemptions" from Section 214 requirements for line extensions. [115] The *Section 214 Blanket Certification Order* expressly permitted Aureon to operate new domestic lines, regardless of the type of traffic that transits them. [116] The breadth of the blanket authority conferred on all carriers, expressly restricted only with regard to radio services not at issue here, rendered unnecessary the prior requirement that Aureon file an application to enter and provide service to ITCs. It follows, *a fortiori*, that as a result of the *Section 214 Blanket Certification Order*, Aureon similarly could use its existing, authorized lines to transmit any type of traffic, including access stimulation traffic. [117]

21. AT&T also argues that Aureon's billing of CEA rates for access stimulation traffic is unreasonable because it "is not economically justifiable" and because other transport methods exist that are significantly more efficient. [118] We are not persuaded by AT&T's arguments. We have found that Aureon properly billed for services under the terms of the Tariff, and none of the alternatives that AT&T suggests are services that the Tariff offers. [119] In any event, AT&T's real dispute is that it wants to bypass Aureon completely and directly interconnect with the subtending CLECs engaged in access stimulation. [120] In fact, AT&T has filed with the Commission a complaint against the most prominent access stimulator, Great Lakes Communication Corporation (GLCC), alleging that GLCC has violated Section 201(b) of the Act by unreasonably refusing to provide AT&T a direct connection to GLCC at rates charged by CenturyLink, which has the lowest rates for switched access service of any price-cap ILEC in Iowa. [121]

22. Finally, we reject AT&T's assertion that Aureon's Section 214 authorization does not apply to access stimulation traffic, which is predominantly interstate, because its Section 214 application assumed that the majority of Aureon's costs would be recovered from intraLATA toll calls. [122] Aureon's original Section 214 approval was contingent on Aureon obtaining state agency approval without change to the fundamental assumption that Aureon would substantially recover its costs through revenue from intraLATA toll calls. [123] But this condition was satisfied, and Aureon did in fact obtain Section 214 approval. [124]

B. Aureon Violated Sections 201(b) and 203 of the Act by Raising Its CEA Tariffed Rate in 2013 and by not Lowering Its Intrastate CEA Rate.

***8** 23. AT&T argues that Aureon violated Sections 201(b) and 203 of the Act by raising its interstate access rates and by not reducing its intrastate access rates in contravention of the Commission's rate cap and rate parity rules, respectively. [125] We agree. In the *USF/ICC Transformation Order*, the Commission capped "*all* interstate switched access rates in effect as of [[December 29, 2011], including originating access and all transport rates." [126] Rule 51.905(b) caps interstate "tariff rates [at] no higher than the default transitional rate," [127] i.e., the interstate rates effective December 31, 2011. In addition, "to reduce the disparity between intrastate and interstate terminating end office rates,"

the Commission required that the rates be brought "to parity within two steps, by July 2013." [128] Specifically, the Commission promulgated Rule 51.911, which requires a ""Competitive LEC" (1) to cap its intrastate rates that were in effect on December 29, 2011; (2) beginning on July 3, 2012, to move those intrastate rates halfway to the level of its capped interstate rates; and (3) beginning on July 1, 2013, to reduce its intrastate and interstate rates to those of the competing ILEC, which would be at parity at such time. [129]

24. We find that Aureon violated the interstate rate cap requirement when, in June 2013, it raised its interstate switched access rate from to $0.00896 per minute—$0.00077 above its $0.00819 cap. [130] We further conclude that Aureon violated Rule 51.911(b) because it did not lower its intrastate switched access rates halfway to the level of its interstate rates. Aureon's intrastate rate for CEA switching services has remained unchanged since the early 1990s at $0.0114 per minute plus $0.0003 per minute, per mile for transport, well above its interstate rate. [131] In light of these violations, we find the rates contained in Aureon's 2013 tariff filing and in Aureon's intrastate tariff to be unlawful. We do not reach the issue of whether Aureon's rates violate Rule 51.911(c) because we do not have an adequate record to determine the pertinent benchmark rate. To the extent that Aureon's rates exceed this benchmark, however, the rates in Aureon's intrastate or interstate tariff would also be unlawful under Rule 51.911(c). [132]

25. Aureon claims it did not violate the rate cap and rate parity requirements for several reasons, none of which we find convincing. To begin, Aureon claims that it is not subject to the Transitional Access Service Pricing rules because it is a dominant carrier under Rule 61.38. Aureon characterizes the statement in the *USF/ICC Transformation Order* capping all interstate switched access rates as "words of inordinately general connotation" that do not supersede "regulations dealing with a narrow, precise, and specific subject, such as the dominant carrier rate regulations in Section 61.38." [133] According to Aureon, the rules the Commission enacted in the *USF/ICC Transformation Order* capped only the rates of ILECs and CLECs. Aureon contends it is neither. But that is incorrect. For purposes of the *USF/ICC Transformation Order* and the attendant rules, [134] Aureon is a CLEC. First, Aureon is a LEC under Rule 51.5 because it "provi[des] ... exchange access." [135] And Aureon has conceded as much. [136] Second, Aureon is not an ILEC under Rule 51.5 because it neither provided "telephone exchange service" on February 8, 1996, nor was it a member of NECA on February 8, 1996, (or a successor to a member). [137] Nor does Aureon anywhere claim it is an ILEC. Third, Aureon must therefore be a CLEC for purposes of the rules adopted by the *USF/ICC Transformation Order* because a "competitive local exchange carrier is any local exchange carrier, as defined in [Section] 51.5, that is not an incumbent local exchange carrier." [138]

***9** 26. Aureon argues that the rate cap and rate parity rules "must give way" to Section 61.38, [139] because the two sets of rules are inconsistent. [140] We disagree. The two sets of rules do not conflict; rather, they complement each other. To begin, a dominant carrier such as Aureon must comply with Section 61.38 and supply "supporting ... material" justifying its rates. [141] If the underlying cost studies and other material support the rate filed in a dominant carrier's tariff, then the tariff usually will go into effect. Aureon acknowledges that it is subject to this obligation, [142] and, in fact, it has consistently filed cost support for its tariffed rates. [143] Next, like all LECs, Aureon is subject to additional obligations. As a CLEC, Aureon must comply with the rate cap and rate parity rules, which apply "[n] otwithstanding any other provision of the Commission's rules." [144] Under those rules, regardless of how a CLEC calculates its rates (e.g., via a non-dominant carrier's benchmarking or the procedures of Section 61.38), the rates may not exceed the specified cap. [145] Stated differently, Aureon must comply with the 61.38 rules to support its rates at or below the cap and therefore Section 61.38 is not superfluous. [146] But if the rates it calculates exceed the rate caps, as they did in Aureon's June 2013 tariff filing, Aureon must lower them.

27. Nothing in the Commission's 2016 *Technology Transitions Order* alters this conclusion.[147] In that Order, the Commission stated in a footnote that "non-dominant status does not extend to [CEA] providers because such carriers do not provide service to end users."[148] Aureon claims that the Commission's rate caps do not apply to CEA providers because the Commission has declined to extend non-dominant status to CEA providers.[149] As explained above, however, Aureon's status as a dominant carrier does not excuse it from the Commission's rate cap obligations—the rate caps depend on whether Aureon is a LEC and a CLEC, not non-dominance. In any event, Aureon misconstrues the *Technology Transitions Order*. A non-dominance determination (i.e., a determination that a carrier lacks market power) involves an examination of many factors concerning the market for the services in question.[150] Consistent with this approach, in the *Technology Transitions Order*, the Commission analyzed evidence about market demand in the context of its transition rules.[151] The Commission did not make a non-dominance finding as to Aureon and other CEA providers because there was no record concerning them. Neither Aureon nor any other CEA providers participated in the proceeding. In other words, there was no basis on which the Commission could find that CEA providers lacked market power. Thus, Aureon is reading into the Commission's sentence in footnote 43 of the *Order* a determination about rate caps that simply is not there. In fact, the *Technology Transitions Order* reaffirmed that "*[a]ll* interstate switched access rate elements are capped."[152] That includes when those elements are offered by CEA providers.

***10** 28. Aureon further maintains that the rate cap and rate parity rules do not apply to it, because it does not directly serve end users and, consequently, cannot directly offset any decrease in revenue from increased charges on end users.[153] However, nothing in the *USF/ICC Transformation Order* suggests that the Commission intended to exclude CEA providers from its scope.[154] On the contrary, the *Order* stated broadly that the Commission was "abandon[ing] the 'calling party-network-pays' model that dominated ICC regimes of the last century."[155] As part of the intercarrier compensation reform, the Commission took the initial step of adopting rate caps to "ensure[[] that no rates increase during reform" and to "combat potential arbitrage and other efforts designed to increase or otherwise maximize sources of intercarrier revenues during the transition."[156] That is why the Commission recently rejected a similar argument made by another intermediate transport provider that also served no end users, concluding that there is "no "longstanding [Commission] policy of not imposing rate caps on carriers that do not serve end-users,"' and that the carrier "must comply with existing rules during the transition to 'bill and keep."'[157] In upholding the Commission's decision, the D.C. Circuit emphasized that the "issue here is not what Great Lakes may charge once the transition to bill-and-keep is complete in 2018, but rather whether Great Lakes was subject to the Commission's benchmark rule in the years prior to AT&T's 2014 complaint ... [t]he Commission reasonably concluded that it was."[158] Whatever additional transition steps the Commission ultimately may decide apply to CEA providers such as Aureon (or other entities that do not directly serve end users) in the future has no relevance to Aureon's current duty to comply with existing law.[159]

29. Finally, Aureon contends that the CEA rate contained in its June 17, 2013, interstate tariff filing took effect on July 2, 2013, because the Commission neither suspended nor investigated the rate increase, and therefore it is "deemed lawful."[160] We disagree. Aureon's Tariff was not "deemed lawful" when filed. Nothing in Section 204(a)(3) of the Act transforms rates, terms, or conditions that are unlawful when filed into "deemed lawful" status. "[T]ariffs still must comply with the applicable statutory and regulatory requirements," and "[t]hose that do not may be declared invalid."[161] Where the Commission, as here, has prohibited the filing of a tariff with rates above the transitional default rate,[162] such a tariff cannot benefit from ""deemed lawful" status. As of December 29, 2011, Aureon's interstate switched access rates should not have exceeded $0.00819 per minute. Aureon's 2013 tariff filing raising the interstate rates above that level (as well as its subsequent tariff filings containing rates above $0.00819 per minute) consequently was unlawful when filed and void *ab initio*.[163]

***11** 30. AT&T argues that Aureon's CEA rates also are unlawful because Aureon engaged in improper accounting practices. [164] We need not reach this issue, because we have decided that Aureon's interstate Tariff is void *ab initio*. Nevertheless, Aureon is subject to Section 61.38 of the Commission's rules, and AT&T has raised a number of significant questions about Aureon's CEA practices and rates that deserve further exploration. These include Aureon's treatment of network investment, its cost allocations, and the role of lease costs involving the regulated entity and a competitive services affiliate. [165] We will consider these arguments in the damages phase of this proceeding, where we will establish what the appropriate tariff rate should have been beginning June 17, 2013. [166]

C. Aureon Did Not Violate the Commission's Access Stimulation Rules.

31. AT&T alleges that Aureon violated Sections 201(b) and 203 by engaging in access stimulation and failing to file revised tariffs. [167] AT&T argues that Aureon satisfies the two "conditions" that "identify when an access stimulating LEC must refile its interstate access tariffs." [168] To begin, AT&T contends that Aureon's ratio of terminating minutes to originating minutes in a calendar month is well above the 3-1 ratio specified in the Commission's rules. [169] The parties' stipulations support this assertion. [170] Next, AT&T maintains that Aureon has implied revenue sharing agreements with the subtending CLECs, which inure to the benefit of the CLECs' FCP partners. [171] We disagree on the last point.

32. Our rule requires that an access stimulator be party to an "access revenue sharing agreement ... that, over the course of the agreement, would directly or indirectly result in a net payment to the other party." [172] The problem for AT&T is that Aureon has provided an affidavit from an officer attesting that Aureon is not a party to any revenue sharing agreement, [173] and AT&T has not proven otherwise.

33. AT&T instead contends that Aureon's traffic agreements with "access stimulating CLECs fall within the parameters of the Commission's rule regarding revenue sharing" **[BEGIN CONFIDENTIAL]** *** [174] [175] *** **[END CONFIDENTIAL]** However, Aureon has always charged IXCs—not subtending LECs—for its CEA switched access service, which facilitates the switching and transport of calls from the IXCs' customers to customers of Aureon's subtending LECs. [176] Although Aureon has traffic agreements with the subtending LECs, these agreements pertain to Aureon's ability to provide CEA service to IXCs and the mandatory termination requirement of its Section 214 authorization. [177] They have remained unchanged since 1989. [178] AT&T can identify no change in Aureon's practices indicating that its traffic agreements are intended to facilitate access stimulation beyond noting that certain CLECs and their FCP partners now engage in access stimulation. [179] As we held above, Aureon's handling of the traffic destined for access stimulating CLECs is consistent with its Section 214 authorization and the Tariff. [180]

***12** 34. AT&T requests that, in the event there is not an access stimulation agreement within the meaning of the Commission's rules, we nonetheless find that Aureon's conduct is an unreasonable practice under Section 201(b) because Aureon "facilitated access stimulation schemes by entering into traffic agreements to carry CLECs' access stimulation traffic that [otherwise] would have been subject to the pricing requirements of the access stimulation rules." [181] We decline to so rule in this adjudication. The premise of this argument is that the CLECs are required to "price their switched access services, including transport, at rates that do not exceed the rates for functionally equivalent service offered by the lowest-priced price cap LEC in the state, which is CenturyLink" and to offer a direct transport service like CenturyLink. [182] AT&T appropriately raised this assertion in another formal complaint proceeding against GLCC,, described above, and that is where the Commission will decide the issue.

IV. CONCLUSION

35. We have found above that Aureon violated Sections 201(b) and 203 of the Act because its rates were not just and reasonable. We therefore grant Counts I and II of AT&T's Complaint in part consistent with the findings in this Order. In the damages phase of this proceeding, we will conduct a detailed review of Aureon's rates to determine what the appropriate tariff rates should have been. [183] We also order Aureon to file a revised interstate tariff with rates that comply with this Order, as well as all necessary cost studies and support as required by Section 61.38 of the Commission's rules for its revised rates within 60 days of the date of this Order. [184]

V. ORDERING CLAUSES

36. Accordingly, IT IS HEREBY ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 203, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. § § 151, 154(i), 154(j), 201, 203, 208, and Sections 1.720-1.736, 61.26, and 61.38 of the Commission's Rules, 47 CFR §§ 1.720-1.736, 61.26, 61.38, that Count I is GRANTED IN PART as described herein.

37. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 203, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 208, and Sections 1.720-1.736, 61.26 and 61.38 of the Commission's Rules, 47 CFR §§ 1.720-1.736, 61.26, and 61.38 that Count II is GRANTED IN PART as described herein.

***13** 38. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 203, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 208, and Sections 1.720-1.736, 61.26 and 61.38 of the Commission's Rules, 47 CFR §§ 1.720-1.736, 61.26 and 61.38 that Aureon is directed to file a revised interstate tariff within 60 days from the date of this Order, and that such revised tariff is to be compliant with the Commission's rate cap requirements, and must include required cost support.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

1 Formal Complaint of AT&T Corp., Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (filed June 8, 2017) (Complaint). *See* paragraph 10 below.

2 Under Section 1.722(d) of the Commission's rules, AT&T elected to bifurcate its liability and damages claims. Complaint at 9, para. 20 (citing 47 CFR § 1.722(d)).

3 Complaint at 12, para. 25, Iowa Network Services, Inc. d/b/a Aureon Network Services Answer to the Formal Complaint of AT&T Corp., Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (filed June 28, 2017) (Answer) at 15, para. 25.

4 Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (filed July 20, 2017) (Joint Statement) at 2, Stipulated Fact 2.

5 Joint Statement at 2, Stipulated Fact 3.

6 Joint Statement at 2, Stipulated Fact 5.

7 Joint Statement at 2, Stipulated Facts 6, 7.

8 Joint Statement at 3, Stipulated Facts 10, 11. These services include (a) voice services (VoIP, IP Fax, hosted PBX); (b) dedicated Internet access; (c) cloud and data storage; (d) IT support (technology planning, help desk, disaster recovery, IT security); (e) human resources (administrative services, staffing, leadership development, senior living services); and (f) call centers. *Id.* at 3, Stipulated Fact 11.

9 Joint Statement at 2, Stipulated Fact 6.

10 *See United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 196 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (*U.S. v. AT&T*); *see also* 47 U.S.C. § 251(g).

11 *See* Complaint, Exh. 10, FCC, Distribution of Equal Access Lines and Presubscribed Lines, 1997 WL 677407 (C.C.B. Nov. 3, 1997).

12 Complaint at 13, para. 31; Answer at 17, para. 31.

13 *See In re Applications of Iowa Network Access Div.*, Memorandum Opinion, Order and Certificate, 3 FCC Rcd 1468 (1988) (*INS Section 214 Order*), para. 3.

14 *See U.S. v. AT&T*, 552 F. Supp. at 196-98.

15 Joint Statement at 4, Stipulated Fact 18.

16 *Id.*

17 Joint Statement at 4, Stipulated Fact 19.

18 Joint Statement at 4, Stipulated Fact 20.

19 Joint Statement at 4, Stipulated Fact 21.

20 *Id.*; Complaint at 14-15, para. 33.

21 Joint Statement at 4, Stipulated Fact 22; *INS Section 214 Order*. The Commission also has authorized the provision of CEA service in Indiana, South Dakota, and Minnesota. Complaint at 15, para. 34.

22 Joint Statement at 4, Stipulated Fact 26.

23 Joint Statement at 4, Stipulated Fact 25.

24 Joint Statement at 5, Stipulated Fact 29.

25 Joint Statement at 4, Stipulated Fact 27.

26 Joint Statement at 5, Stipulated Fact 28.

27 *Compare* 47 CFR §§ 61.19-61.26, *with* 61.31-61.59. *See All Am. Tel. Co., Inc. v. FCC*, 867 F.3d 81, 84 (D.C. Cir. 2017) ("When it comes to determining the amount of that access charge, however, not all local carriers are the same ... federal law divides local carriers into 'incumbent local exchange carriers' and 'competitive local exchange carriers.'").

28 The Commmision developed the dominant/nondominant dichotomy in the *Competitive Carrier First Report & Order*, designating AT&T, independent telephone companies, Western Union, domestic satellite carriers (Domsats), Domsat resellers, and what were known as miscellaneous common carriers (providers of relay video signals and their corresponding audio components by terrestrial microwave links) as dominant. *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 FCC 2d 1, 10-11, para. 26 (1980) (*Competitive Carrier First Report & Order*). All other carriers were classified as nondominant. *Id.*, 85 FCC 2d at 11, para. 27.

29 *See* 47 U.S.C. § 203.

30 *Establishing Just and Reasonable Rates for Local Exchange Carriers*, Notice of Proposed Rulemaking, 22 FCC Rcd 17989, 17992, para. 6 (2007).

31 *See* 47 CFR §§ 61.38-61.39.

32 *Connect America Fund et al.*, Report and Order, Order and Order on Reconsideration and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, 3215, para. 337 (2016) (*Rate-of-Return Reform Order*).

33 *See Competitive Carrier First Report and Order*, 85 FCC 2d at 11, para. 27; *Tariff Filing Requirements for Non- Dominant Common Carriers*, Memorandum Opinion and Order, 8 FCC Rcd 6752, 6754 (1993), *vacated and remanded in part on other grounds*, *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995).

34 Our rules requiring the filing of cost support, such as Rules 61.38 and 61.39, apply only to dominant carriers. 47 CFR §§ 61.38, 61.39.

35 *See Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9926, para. 8 (2001) (*CLEC Access Charge Reform Order*).

36 *See Access Charge Reform*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, 21475-76, para. 278 (1996).

37 *See CLEC Access Charge Reform Order*, 16 FCC Rcd at 9925, para. 3.

38 *See* 47 CFR § 61.26(b), (c). The Commission exempts a narrow class of rural CLECs from its benchmark rule permitting qualifying carriers to file tariffs containing rates "at the level of those in the NECA access tariff." 47 CFR § 61.26(a)(6) and (e).

39 *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9925, para. 3, 9938, para. 40.

40 *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*USF/ICC Transformation Order*), *pets. for review denied, In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

41 *USF/ICC Transformation Order*, 26 FCC Rcd at 17904-956, paras. 736-846.

42 *See USF/ICC Transformation Order*, 26 FCC Rcd at 17904, para. 737.

43 *USF/ICC Transformation Order*, 26 FCC Rcd at 17932-34, paras. 798, 800-01 ("We also take measures today to start reforming other elements as well by capping all interstate switched access rates in effect as of the effective date of the rules, including originating access and all transport rates."), 17934, para. 801 ("Thus, at the outset of the transition, all interstate switched access and reciprocal compensation rates will be capped at rates in effect as of the effective date of the rules. We cap these rates as of the effective date of the rules.").

44 *USF/ICC Transformation Order*, 26 FCC Rcd at 17936-37, para. 805 ("The transition imposes a cap on all intrastate rates for price cap carriers [and CLECS that benchmark access rates to price cap carriers], and all terminating intrastate access rates for rate-of-return carriers [and CLECS that benchmark access rates to rate-of- return carriers]). The Commission also required LECs to reduce their intrastate originating dedicated transport rates to interstate levels. *See USF/ICC Transformation Order*, 26 FCC Rcd 17934-35, para. 801.

45 *USF/ICC Transformation Order*, 26 FCC Rcd at 17937, para. 807 ("Application of our access reforms will generally apply to competitive LECs via the CLEC benchmarking rule.").

46 *USF/ICC Transformation Order*, 26 FCC Rcd 17934-36, para. 801, Figure 9.

47 *See Rate-of-Return Reform Order*, 31 FCC Rcd at 3129, para. 229 n.500.

48 47 CFR § 61.26(g); *USF/ICC Transformation Order*, 26 FCC Rcd at 17874-90, paras. 656-701.

49 *USF/ICC Transformation Order*, 26 FCC Rcd at 17874, para. 656. *See* Joint Statement at 6, Stipulated Fact 47; *see generally All American Tel. Co., Inc. v. FCC*, 867 F.3d 81, 85 (D.C. Cir. 2017).

50 *USF/ICC Transformation Order*, 26 FCC Rcd at 17676, para. 33, 17873, para. 649, 17875-77, paras. 663-66.

51 47 CFR § 61.26(g)(1); *USF/ICC Transformation Order*, 26 FCC Rcd at 17886, para. 690.

52 Joint Statement at 4, Stipulated Fact 24.

53 *Id.*

54 Joint Statement at 5, Stipulated Fact 34. *See* Complaint, Exh. 3, INAD Tariff F.C.C. No. 1, § 1.1, 2nd Revised Page 16 (issued Oct. 27, 2000).

55 Joint Statement at 5, Stipulated Fact 35.

56 Joint Statement at 5, Stipulated Fact 37. The Commission recently requested that parties refresh the record regarding tandem switching and transport services in the intercarrier compensation reform proceedings. *See Parties Asked to Refresh the Record on Intercarrier Compensation Reform Related to the Network Edge, Tandem Switching and Transport, and Transit*, Public Notice, DA 17-863, 2017 WL 3953397 (Sept. 8, 2017). Specifically, the Commission sought comments on "what steps [it] should take to transition the remaining elements associated with tandem switching and transport to bill-and-keep." *Id.* This request implicates carriers such as Aureon that provide tandem switching and transport, but are not terminating carriers.

57 Joint Statement at 5, Stipulated Fact 34.

58 Joint Statement at 9, Stipulated Fact 80.

59 Joint Statement at 8, Stipulated Fact 59.

60 Joint Statement at 8, Stipulated Facts 60, 61. Aureon's present tariffed intrastate rate is $0.0114 per minute for CEA switching services plus $0.003 per minute, per mile for transport, and it has been at the level since the early 1990s. Joint Statement at 8, Stipulated Fact 69.

61 Joint Statement at 5, Stipulated Fact 38.

62 *Id.*

63 Joint Statement at 6, Stipulated Fact 39.

64 Joint Statement at 6, Stipulated Fact 40.

65 Joint Statement at 6, Stipulated Fact 41.

66 Joint Statement at 6, Stipulated Fact 42.

67 *Id.*

68 Joint Statement at 9, Stipulated Facts 73, 74. Depending on the choices made by the end user's provider (i.e., whether it subtends Aureon's network), AT&T must connect to that provider through Aureon. *See* 47 U.S.C. § 251(a) ("Each telecommunications carrier has the duty ... to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.").

69 Joint Statement at 5, Stipulated Fact 37.

70 *See AT&T Corp. v. Alpine Communications, LLC*, Memorandum Opinion and Order, 27 FCC Rcd 11511, 11513- 14, paras. 6-8. *See also AT&T Corp. v. Great Lakes Communication Corp*, Proceeding No. 16-170, Bureau ID No. EB-16-MD-001 (filed Aug. 16, 2016), Complaint, Legal Analysis at 13 (*AT&T v. Great Lakes Complaint*).

71 Principal among these access-stimulating LECs is Great Lakes Communication Corporation, against which AT&T has filed a formal complaint that is pending before the Commission. *See* footnote 70 above; *see also* Joint Statement of Stipulated Facts, Disputed Facts, Key Legal Issues, and Discovery and Scheduling, Proceeding Number 16-170, Bureau ID Number EB-16-MD-001 (filed Oct. 17, 2016) at 4, Stipulated Fact 24 ("GLCC is engaged in "access stimulation" as defined under the Commission's rules.").

72 Joint Statement at 6-7, Stipulated Fact 48.

73 Joint Statement at 9, Stipulated Fact 75.

74 *Id.*

75 Joint Statement at 9, Stipulated Fact 76.

76 Joint Statement at 9, Stipulated Fact 77.

77 Joint Statement at 3, Stipulated Fact 12.

78 Complaint at 29, para. 60; Complaint, Exh. 45, Defendant's Answer and Counterclaims, *Iowa Network Services v. AT&T Corp.*, No. 14-3439 (D.N.J. Aug. 4, 2014); Answer at 32, para. 60.

79 Joint Statement at 3, Stipulated Fact 13.

80 Joint Statement at 3, Stipulated Fact 14. On October 28, 2015, Aureon filed a motion asking the District Court to reconsider its October 14, 2015, Order. Joint Statement at 3, Stipulated Fact 15. The District Court denied Aureon's motion for reconsideration on December 8, 2015. Joint Statement at 3, Stipulated Fact 16.

81 Letter to Marlene H. Dortch, Secretary, FCC, from James U. Troup, Counsel for Aureon (Aug. 5, 2016); Letter to Christopher Killion, Chief, Market Disputes Resolution Division, FCC Enforcement Bureau, from Michael J. Hunseder, Counsel for AT&T (Aug. 12, 2016).

82 Joint Statement at 3, Stipulated Fact 17. *See* Letter from Lisa B. Griffin, Deputy Chief, Markets Dispute Resolution Division, FCC Enforcement Bureau, to James F. Bendernagel, Counsel for AT&T, and James U. Troup, Counsel of Aureon, Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (Sept. 27, 2016).

83 Consistent with the September 27, 2016, Letter Ruling, the Complaint addressed the affirmative defenses and counterclaims that AT&T raised in the District Court and that the District Court referred to the Commission. The District Court did not refer Aureon's collection action claims against AT&T, and they remain pending with the Court. Although Aureon requests that the Commission address its claims against AT&T, we decline to do so in this proceeding. *See* Initial Brief of Iowa Network Services, Inc. d/b/a Aureon Network Services, Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (filed Aug. 21, 2017) (Aureon Initial Brief) at 1-4. Aureon's claims against AT&T would be "cross-complaints" in this case, which the Commission's formal complaint rules prohibit. 47 CFR § 1.725 (prohibiting cross-complaints— including counterclaims— seeking relief against a carrier that is a party to a proceeding).

84 Complaint at 64-68, paras. 134-46.

85 Complaint at 68-70, paras. 147-54.

86 Complaint, at 30-40, paras. 62-80; Complaint, Legal Analysis at 4-28; AT&T's Reply to the Answer, Response to Affirmative Defenses, and Information Designation, Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (filed July 5, 2017) (Reply), Legal Analysis at 5-22.

87 Complaint at 44-51, paras. 86-101; Complaint, Legal Analysis at 28-38; Reply, Legal Analysis at 22-31.

88 Complaint at 51-57, paras. 102-17; Complaint, Legal Analysis at 38-48; Reply, Legal Analysis at 31-38.

89 Complaint at 57-64, paras. 118-33; Complaint, Legal Analysis at 48-62; Reply, Legal Analysis at 38-58; Final Brief of AT&T Corp., Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (filed Aug. 21, 2017) (AT&T Initial Brief) at 3-9; Final Reply Brief of AT&T Corp., Proceeding Number 17-56, Bureau ID Number EB-17-MD- 001 (filed Aug. 28, 2017) at 5-10 (AT&T Reply Brief).

90 *See* footnote 78 above.

91 *See* Reply.

92 Complaint at 30-43, paras. 62-85, at 64-70, paras. 134-54; *see, e.g.*, Complaint, Legal Analysis at 1-2, 13-15; Reply, Legal Analysis at 5-22. AT&T has paid Aureon's charges for traffic that transits to and from LECs that AT&T does not contend

are access stimulators. Joint Statement at 9, Stipulated Facts 76 and 77; AT&T Answer to Interrogatory No. 4; Aureon Initial Brief at 2; AT&T Initial Brief at 3-4.

93 Joint Statement at 5, Stipulated Facts 34, 35.

94 Joint Statement at 5, Stipulated Fact 35.

95 Complaint at 31-75, paras. 63-75; *see, e.g.*, Complaint, Legal Analysis at 6-7 (citing *AT&T Corp. v. YMax Commc'ns Corp.*, 26 FCC Rcd 5742, 5748, para. 12 (2011) (*AT&T v. YMax*)); Reply, Legal Analysis at 5-15.

96 *See, e.g.*, *AT&T Corp. v. All Am. Tel. Co.*, Memorandum Opinion and Order, 28 FCC Rcd 3477, 3492-96, at paras. 34-41 (2013); *AT&T v. YMax*, 26 FCC Rcd at 5748, para. 12 ("Consistent with these statutory provisions [in Section 203], a carrier may lawfully assess tariffed charges only for those services specifically described in its applicable tariff."); *MCI WorldCom Network Servs. v. PaeTec Commc'ns, Inc.*, 204 Fed. Appx. 271, 272 n.2 (4th Cir. 2006) ("[A] carrier is expressly prohibited from collecting charges for services that are not described in its tariff."); *CoreTel Va., LLC v. Verizon Va., LLC*, 752 F.3d 364, 374 (4th Cir. 2014) (A carrier "must provide its services in exactly the way the carrier describes them in th[e] tariff." (emphasis added)).

97 *See* Complaint, Exh. 3, INAD Tariff F.C.C. No. 1, § 1.1, 2nd Revised Page 16 (issued Oct. 27, 2000). The Tariff also states that "[s]witched access services provided under this tariff cover only the use of [Aureon's] central access tandem, the switched transport between an [Aureon] premises and such central access tandem, and the use of the [Aureon]/ONVOY Common Channel Signaling Access Network." *Id.*

98 *See* Complaint, Exh. 3, INAD Tariff F.C.C. No. 1, § 6.1, 4th Revised Page 88 (issued Jan. 18, 2012).

99 *See id.*

100 Reply, Legal Analysis at 8.

101 *See* Reply, Legal Analysis at 8.

102 Nor did the Commission find in the *USF/ICC Transformation Order* that "traffic directed to access stimulators should not be subject to tariffed access charges in all cases." *USF/ICC Transformation Order*, 26 FCC Rcd at 17879, para. 672 (rejecting arguments that the Commission should prohibit the collection of switched access charges for traffic sent to access stimulators). Rather, the Commission chose to adopt a specific set of access stimulation rules as part of comprehensive intercarrier compensation reform to "address remaining incentives to engage in access stimulation." *Id.*

103 *CoreTel Virginia, LLC v. Verizon Virginia, LLC*, 752 F.3d 364, 375 (4th Cir. 2014) (holding that the more specific usage of language in a tariff prevails over general usage); *Associated Press v. FCC*, 452 F.2d 1290, 1296 (D.C. Cir. 1971) (referring to "the accepted principle that provisions under a specific tariff designation prevail over those included under a more general heading").

104 Joint Statement at 5, Stipulated Facts 29-31.

105 Because Aureon's tariff applies to access stimulation traffic, it did not violate Section 203 of the Act by not filing a new tariff or modifying its existing Tariff to specifically cover access stimulation traffic. *Cf.* Complaint, Legal Analysis at 6-15; Reply, Legal Analysis at 14-15, 21-22.

106 Complaint, Legal Analysis at 7 (capitalization omitted).

107 *Id.* at 10 (capitalization omitted).

108 *INS Section 214 Order*, 3 FCC Rcd. at 1468, para 4; *id.* at 1474, para 38; Answer, Exh. 28, Iowa Network Access Division, Final Decision and Order, Docket No. RPU-88-2, 1988 Iowa PUC Lexis 1, slip op. at 10 (IUB Oct. 18, 1988); *Nw. Bell Tel. Co. v. Iowa Utils. Bd.*, 477 N.W.2d 678, 681 (Iowa 1991).

109 *See* 47 CFR § 61.38; Answer, Exh. B, F. Hilton Decl. at 12, para. 19. *Cf. In re FCC 11-161*, 753 F.3d 1015, 1144-45 (10th Cir. 2014) (quoting *USF/ICC Transformation Order*, 26 FCC Rcd at 17874, para. 657).

110 *See* Complaint at 35-36, paras. 74-75; Complaint, Legal Analysis at 13-15; Reply, Legal Analysis at 10, n.8; AT&T Initial Brief 14-15; Complaint, Exh. 46, INS April 2017 Revised Tariff Filing, § 7.1.1, Original Page 146.1 (filed Apr. 14, 2017).

111 Complaint, Legal Analysis at 13 n.18; Joint Statement at 6, Stipulated Fact 41. On May 17, 2017, the Wireline Competition Bureau granted Aureon special permission to withdraw the filing. *See* Iowa Network Access Division Application for Special Permission No. 8 (filed May 16, 2017), and granted under Special Permission No. 17-06 (May 17, 2017).

112 *See* Complaint, Exh. 46, INS April 2017 Revised Tariff Filing (filed Apr. 14, 2017), Transmittal No. 33, Description and Justification Cost Support Material, Introduction, (stating that the tariff "is based upon a contract that was negotiated with and voluntarily agreed to by an interexchange carrier that has not previously purchased centralized equal access [] service" and that INS is thereby "making the same contract rate, terms, and conditions generally available to similarly situated interexchange carriers that execute the same contract").

113 *See* Complaint, Legal Analysis at 7-9, 20, n. 33; Reply, Legal Analysis at 14; *see also* Complaint at 13-17, paras 31-36.

114 *See INS Section 214 Order*, 3 FCC Rcd at 1469, para. 9, at 1468, para. 2 & n.6. Independent telephone companies are telephone companies that are not affiliated with the Bell operating companies. *See MTS and WATS Market Structure, Phase III*, Notice of Proposed Rulemaking, 94 FCC 2d 292, 304 (1983), para. 27.

115 *See In the Matter of Implementation of Section 402(B)(2)(A) of the Telecommunications Act of 1996*, Report and Order and Memorandum Opinion and Order, 14 FCC Rcd 11364, 11372, para. 12, 11377, para. 23 (1999) (*Section 214 Blanket Certification Order*).

116 *See Section 214 Blanket Certification Order*, 14 FCC Rcd at 11372, para. 12. The Commission stated, "blanket authority for domestic telecommunications carriers is a deregulatory measure that allows carriers to construct, operate, or engage in transmission over lines of communication without filing an application with the Commission for 'entry' certification under section 214." *Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations*, Report and Order, 17 FCC Rcd 5517, 5520, para. 4 and n.7 (2002). The Commission codified this authority in Section 63.01 of its rules, which states that "*any* party that would be a domestic interstate telecommunications common carrier is authorized to provide domestic, interstate services to *any* domestic point and to construct or operate *any* domestic transmission line, as long as it obtains all necessary authorizations from the Commission for use of radio frequencies." 47 CFR § 63.01 (emphasis added).

117 *Cf.* Complaint, Legal Analysis at 14, nn.21, 20.

118 Complaint at 37-40, paras. 76-80, at 65-66, para. 138; Complaint, Legal Analysis at 43-48.

119 *See* paragraphs 17-18 above.

120 *See* Complaint at 37, para. 77.

121 *See AT&T v. Great Lakes Complaint* at 40-41, para. 86.

122 *See* Complaint at 35, para. 73; Complaint, Legal Analysis at 8, nn.10, 12, 25, 57.

123 *See INS Section 214 Order*, 3 FCC Rcd. at 1473, para. 32.

124 *See In re the Application of Iowa Network Access Division*, Memorandum Opinion and Order, 4 FCC Rcd 2201, 2201, para. 7 (1989) ("[W]e conclude INAD's [[the Access Division's] state authority satisfies our condition."). Indeed, the assumption concerning intraLATA toll calls remained valid until 20 years after the *INS Section 214 Order. See* Complaint, Rhinehart Decl. para. 29, Table G (showing that, prior to 2008, intrastate CEA service supplied most of the Access Division's overall revenue requirement). It was only after the *Section 214 Blanket Certification Order*, which imposed no conditions concerning intraLATA cost recovery, that Aureon's interstate traffic began to exceed intrastate traffic. *See id.*

125 Complaint at 44-51, paras. 86-101.

126 *USF/ICC Transformation Order*, 26 FCC Rcd at 17933, para. 800 (emphasis added). The Commission declined to adopt a "future date" for carriers to comply with the rate cap directive "to ensure that carriers cannot make changes to rates or rate structures to their benefit in light of the reforms adopted in this Order." *Id.*, 26 FCC Rcd at 17934-35, para. 801.

127 47 CFR § 51.905(b).

128 *USF/ICC Transformation Order*, 26 FCC Rcd at 17676-77, para. 35.

129 47 CFR §§ 51.911(a)-(c).

130 Joint Statement at 8, Stipulated Facts 59, 61.

131 Joint Statement at 8, Stipulated Fact 69. It is not possible, based on the current record, to calculate the precise cap on Aureon's intrastate rates under Rule 51.911(b) due to the difference in intrastate and interstate rate structures — that is, the separation of switching and transport rate elements. Nevertheless, because Aureon's intrastate switching rate, alone, is so far above its all-inclusive interstate rate, we can determine with certainty that *some* reduction in the rates for one or both of Aureon's intrastate rate elements was necessary.

132 We intend to develop such facts in the damages phase of this proceeding. Because Rule 51.911(b) concerns the initial step toward rate parity, our reference to the rate parity requirement pertains to both subsections (b) and (c) of Rule 51.911. *See* 47 CFR § 51.911(b), (c).

133 Answer, Legal Analysis at 16-19.

134 *See* 47 CFR §§ 51.901-51.919.

135 47 CFR § 51.5. *See* 47 U.S.C. § 153(20).

136 *See* Complaint, Exh. 53, Letter from James U. Troup and Brian D. Robinson (Counsel for Aureon) to Sherly Todd (FCC), dated Apr. 30, 1998 ("INS provides exchange access services to interexchange carriers and therefore meets the definition of a local exchange carrier.") (emphasis added); Complaint, Exh. 55, Opening Brief of Plaintiff Iowa Network Services, Inc. In Opposition to Motion of Qwest Corporation for Summary Judgment, *Iowa Network Servs., Inc. v. Qwest Corp.*, No. 02-40156, at 7 (S.D. Iowa Aug. 11, 2004) ("INS provides exchange access in conjunction with the many rural LECs which formed INS .... Because INS provides exchange access, it is a LEC."). *See also Iowa Network Servs. v. Qwest Corp.*, 385 F. Supp. 2d 850, 897 (S.D. Iowa 2005) ("INS is, however, a LEC").

137 47 CFR § 51.5.

138 47 CFR § 51.903(a).

139 Answer, Legal Analysis at 14.

140 *See* Answer, Legal Analysis at 10-14.

141 47 CFR § 61.38.

142 Joint Statement at 4, Stipulated Fact 24.

143 Joint Statement at 15, Aureon Disputed Fact 36.

144 47 CFR § 51.905.

145 *See USF/ICC Transformation Order*, 26 FCC Rcd at 17932-936, paras. 798-801; 47 CFR §§ 51.911(a)-(c).

146 We note that Aureon's reliance on legal precedent relating to the ""implied repeal" of statutes (*see* Answer, Legal Analysis at 10) is misplaced, as those cases do not address the lawfulness of an agency's discretion to interpret its own orders and rules. *See Global NAPs, Inc. v FCC*, 247 F.3d 252, 257-58 (D.C. Cir. 2001) (*Global NAPs v. FCC*), *Capital Network System, Inc. v FCC*, 28 F.3d 201, 206 (D.C. Cir. 1994).

147 *See Technology Transitions*, Declaratory Ruling, Second Report and Order, and Order on Reconsideration, 31 FCC Rcd 8283 (2016) (*Technology Transitions Order*).

148 *See Technology Transitions Order*, 31 FCC Rcd at 8290, para. 19 n.43.

149 Answer, Legal Analysis at 6-7 ("The rate caps were the sole reason the Commission reclassified ILECs as non- dominant.").

150 *See, e.g.*, *Technology Transitions Order*, 31 FCC Rcd at 8287, para. 11 ("To determine whether a carrier possesses market power and is thus dominant, the Commission historically has examined 'clearly identifiable market features' such as 'the number and size distribution of competing firms, the nature of barriers to entry, and the availability of reasonably substitutable services.'").

151 *Technology Transitions Order*, 31 FCC Rcd at 8287-98, paras. 13-39.

152 *Technology Transitions Order*, 31 FCC Rcd at 8288-89, para. 15 (emphasis added).

153 Answer at 99; Answer, Legal Analysis at 11-12, 15-16. Aureon's argument that because it has no end users, it cannot recover its costs if its tariff rates must be reduced is not correct. As a result of the Commission's decision to move *all* switched access services to a bill-and-keep regime, without regard to the impact on a carrier's rate of return, *all* access service providers must find new ways to recover their costs. CEA providers may, for example, need to revise their business model and consider recovering a portion of their costs from the LECs who subtend their networks. Those LECs have available all of the cost recovery options adopted by the Commission and affirmed by the Tenth Circuit. This alternative likely could have the additional benefit of discouraging access stimulating LECs from subtending CEA networks.

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155 *USF/ICC Transformation Order*, 26 FCC Rcd at 17676, para. 34.

156 *USF/ICC Transformation Order*, 26 FCC Rcd at 17932-33, para. 798; *id.* at 17933-34, para. 800, n.1494.

157 *See AT&T Servs. Inc. v. Great Lakes Comnet, Inc. and Westphalia Tel. Co.*, 30 FCC Rcd 2586, para. 22 (2015) (*AT&T v. Great Lakes Comnet*), *aff'd in relevant part, Great Lakes Comnet, Inc. v. FCC*, 823 F.3d 998 (D.C. Cir. 2016) (*Great Lakes Comnet v. FCC*).

158 *Great Lakes Comnet v. FCC*, 823 F.3d at 1003-04.

159 *AT&T v. Great Lakes Comnet*, 30 FCC Rcd at 2592-93, para. 22 (how the transition will occur in the future when a tandem owner does not own the end office has "no bearing" on how the Commission's rules "presently appl[y]").

160 Answer, Legal Analysis at 33-34.

161 *Global NAPs v FCC*, 247 F.3d at 260.

162 47 CFR 51.905(b).

163 *See AT&T v. Great Lakes Comnet*, 30 FCC Rcd at 2595, at paras. 28-29.

164 *See, e.g.*, Complaint at 57-64, paras. 118-33; Complaint, Legal Analysis at 48-63.

165 *See* Complaint, Legal Analysis at 48-63; AT&T Initial Brief at 3-9; AT&T Reply Brief at 5-10.

166 *See* Complaint at 70-71, para. 155(c) (requesting that the Commission find that Aureon "must refund amounts it improperly billed to AT&T, and which AT&T paid, in amounts to be determined in a subsequent proceeding), (d) (asking the Commission to conduct "a detailed review of [Aureon's] CEA rates in order to determine ... whether [Aureon] engaged in 'furtive concealment' of violations of the Commission's rules by using improper accounting methods, thus allowing access customers to pursue refunds"). *See also Verizon v. FCC*, 269 F.3d 1098, 1104-06 (D.C. Cir. 2001) (holding that Section 208(b) of the Act applies to a finding of liability).

167 *See* footnote 88 above.

168 Complaint at 52-56, paras. 105-114, Complaint, Legal Analysis at 38-43. *See USF/ICC Transformation Order*, 26 FCC Rcd at 17877, para. 667.

169 Complaint at 53, para. 107; Complaint, Legal Analysis at 38-39 (citing 47 CFR §§ 61.3(bbb)(1)(i)-(ii)).

170 Joint Statement at 8, Stipulated Fact 71.

171 Complaint at 53-56, paras. 108-14; Complaint, Legal Analysis at 40-43.

172 47 CFR § 61.3(bbb)(1)(i).

173 *See* Answer, Exh. 25, Affidavit of Frank Hilton, INS' Reply to AT&T's Opposition to Motion for Summary Judgment of Tariff Claims, at 7-8, para. 12; Answer, Legal Analysis at 26; *see also USF/ICC Transformation Order*, 26 FCC Rcd at 17889, para. 699.

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176 Joint Statement at 4, Stipulated Fact 25; *See* Complaint, Exh. 3, INAD Tariff F.C.C. No. 1, Section 1.2, at 2nd Revised Page 16; Answer at 28-29, paras. 51-52; Answer, Exh. B, F. Hilton Decl. at 12, para. 21.

177 *See* Answer at 27; Answer, Exh. B, F. Hilton Decl. at 11-12, paras. 20-21. *See also INS Section 214 Order*, 3 FCC Rcd at 1473, paras. 33-34 ("We do not believe that the mandatory termination requirement for interstate traffic is unreasonable or differs substantially from the normal way access is provided, as both an originating and terminating service ..."); Answer, Exh. 29, In re: Iowa Network Access Division, Division of Iowa Network Services, Order Granting Rehearing for the Limited Purpose of Modification and Clarification and Denying Intervention, Iowa Utilities Board Docket No. RPU-88-2 (issued Dec. 7, 1988) at 4-5 ("[p]ursuant to their participation agreements with [Aureon], the PTCs [participating telephone companies] will be allowed to require at their option that all terminating traffic be routed over the [[Aureon] network and [Aureon] will be allowed to charge its CEA rate for all such terminating traffic") (emphasis added).

178 *See* Answer at 27-29, paras. 50-51; Answer, Exh. B, F. Hilton Decl. at 11-12, paras. 20-21. We disagree with AT&T's contention that the traffic agreements are anti-competitive. *See* Complaint at 40-45, paras. 81-85; Complaint, Legal Analysis at 16-19. These agreements have long been accepted as an integral aspect of Aureon's ability to terminate traffic, and neither the Commission nor the Iowa Utilities Board have determined differently since the agreements were first authorized in 1988. *See* footnote 139 above. *See also Northwestern Bell Telephone Company v. Iowa Utilities Board*, 477 N.W.2d 678 (1991) ("[W]e conclude that the board's rationales for allowing INS to enter into exclusive contracts with the [subtending LECs] for the provision of terminating access is adequately supported by the evidence.).

179 Whether the CLECs engaged in access stimulation are abiding by the Commission's benchmarking rules is beyond the scope of this complaint proceeding involving AT&T and Aureon.

180 AT&T advocates treating Aureon as a CLEC for purposes of the Commission's access stimulation rules, because (1) Aureon provides "some" of the interstate exchange access services that are used to send traffic to the FCPs, and (2) Aureon "stands in the shoes" of the access stimulating CLECs that would provide transport if Aureon did not. Complaint at 56, para. 114; Complaint, Legal Analysis at 44-45; Reply, Legal Analysis at 32-33. Alternatively, AT&T contends that Aureon is subject to the access stimulation rules as a rate-of-return carrier. Reply, Legal Analysis at 33, n.23. Because we find that Aureon has not entered into a revenue sharing agreement, we need not reach the issue of which, if any, of the Commission's access stimulation rules apply to intermediate carriers, such as CEA providers.

181 Complaint at 56, para. 114; Complaint, Legal Analysis at 38, 45-48.

182 Complaint, Legal Analysis at 46-48.

183 *See* paragraph 30 above. Consequently, we deny as moot AT&T's Motion to Strike Portions of INS's Final Reply Brief and Supporting Declarations. *See* AT&T's Motion to Strike Portions of INS's Final Reply Brief and Supporting Declarations, Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (filed Aug. 31, 2017). In the context of the damages proceeding, the parties will have the opportunity to raise and address issues relating to Aureon's accounting practices.

184 *See* 47 CFR § 61.38. The Commission may determine at such time whether to initiate an investigation of Aureon's proposed rates pursuant to Sections 204 and 205 of the Act. 47 U.S.C. §§ 204, 205. *See also* Complaint at 70-71, para. 155(d). In addition, pursuant to the outcome of the damages phase of this proceeding regarding the correct intrastate rate, the parties should work with the Iowa Utilities Board to ensure Aureon files a revised intrastate tariff containing lawful intrastate switched access rates.

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